APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 81

CLARENCE WILLIAMS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

For Defendant:

Apr. 28, 1967 Minute Entry: On motion of Henry L. Zalut, Assistant United States Attorney, it is ordered that a summons issued for each of the defendants returnable Monday, May 8, 1967, at 2:00 p.m. in Court room No. 3

Apr. 28 1967 Issue summons for each of the defendants.

May 3 File Summons returned by Marshal executed as to deft. Williams by certified mail.

May 3, 1967 File Summons returned by Marshal executed as to deft Jackson by certified mail.

May 4 File Transcript of Proceedings before the U. S. Commissioner

May 8 Minute Entry: Defts, present with counsel, Karl N. Steward and arraigned; waive reading of the indictment; copy previously given to each deft. Each of the defts. pleads not guilty as charged. It is ordered that this case is continued to a later date for trial setting.

May 9, 1967 File Petition of Clarence Williams for Return of Property Illegally Seized.

June 5, 1967 File Defendant's Notice of Hearing Petition for Return of property Illegally Seized for July 3, 1967 at 10:00 A.M.

July 3, 1967 Minute Entry: On the hearing of Deft Williams' Petition for Return of Property Illegally Seized. Morton Sitver and Richard Gormley, Asst. U. S. Attys, present for Govt. Karl Stewart present with deft. Williams. It is ordered that the Petition and Notice of hearing herein is transferred to Case No. Civ-6321 Phoenix.

Dec. 5 Minute entry: On motion of Larry Turoff, it is ordered that this case is set for trial before Judge Copple on Jan. 10, 1968 at 9:30 a.m.

Dec. 8, 1967 Mail notice to counsel re trial setting.

Dec. 19, 1967 Minute entry: It is ordered that Deft's Motion to vacate trial setting and directing that cause be tried subsequent to pending cause is set for hearing December 20, 1967 at 3:30 p.m.

Dec. 19 1967 File Defts' motion to vacate trial setting and directing that cause be tried subsequent to pending cause.

Dec. 20 1967 Minute Entry: Deft's motion to vacate trial setting and directing that this case be tried subsequent to pending cause. John Moran present for the Govt. Karl Stewart present for deft. Williams. Murray Miller present for deft. Jackson. Counsel for deft. Williams states that he was counsel of record for both defts. but that he is unable to continue as counsel for

both defts. and has requested that Murray Miller represent deft. Jackson. Murray Miller states that he has not been formally retained by deft. Jackson but that he expects to be sometime this week. Said motion is now argued. It is ordered that the defendant's motion to vacate trial setting is denied. Subsquently, trial date of January 10, 1968, is vacated and this case set for trial January 16, 1968, at 9:30 a.m.

Jan. 11, 1968 File Defts' Motion to Suppress Illegally Seized Evidence, and Memorandum.

Jan. 12, 1968 Minute entry: Motion to Suppress comes on for hearing. Phillip Malinsky appears for the Government. Murray Miller and Karl Stewart appears for the defendant Clarence Williams. Defendant Jackson is not present. Hearing is now had. It is ordered that said hearing be continued to 9:30 o'clock Jan. 15, 1968.

Jan. 15, 1968, Minute entry: Motion to Suppress on for further hearing. Phillip Malinsky present for Government. Deft Clarence Williams present with Karl Stewart and Deft Arlene Jackson with counsel, Murray Miller. Proceedings are now had: Motion of counsel for Clarence Williams to see files of Harry J. Watson is denied. It is ordered that deft's Motion to Suppress evidence is taken under advisement.

Jan. 16, 1968 File Defts' Motion for Severance and Separate Trial, and Defts' Motion to Dismiss.

Jan. 16, 1968 Minute entry; In chambers: Phillip Malinsky and Morton Sitver present for Government. Murray Miller present for defendant Arlene Jackson and Karl Stewart present for Clarence Williams, Counsel for government moves to strike from the Indictment certain portions namely: 133.560 grams of cocaine and said Motion is hereby granted. Motion of Defts for severance of separate trials is denied. On for trial. Phillip Malinsky and Morton Sitver present for Govt. Deft Clarence Williams present with counsel Karl Stewart and Deft Arlene Jackson present with counsel, Murray Miller. Jury empaneled. Enter

proceedings of trial. Counsel for defts moves to invoke the Rule and all witnesses are excluded from courtroom, except Harry Watson. Enter proceedings of trial. Counsel for deft Jackson moves for a mistrial. Said motion is denied. Counsel for deft Jackson renews motion for mis-trial. Said motion denied. Govt's Exhibits 1 through 5 admitted in evidence. Counsel for deft Jackson moves court for a continuation of hearing on motion to suppress evidence. Said motion is denied. At 4:50 o'clock P.M. Jury admonished and excused to 9:30 o'clock A.M. January 17, 1968. On behalf of Deft Williams, counsel moves court to grant motions that were taken under advisement during motion to suppress hearing and it is ordered that said motions are denied. Counsel for Deft. Williams moves court to grant motion to suppress all exhibits heretofore offered in evidence and it is ordered that said motions are denied. Both counsel for deft Jackson and deft Williams move court for a judgment of acquittal and it is ordered said motions are denied. Order Motion of deft Jackson for a mistrial is denied. At 5:00 o'clock, order recess to 9:30 A.M. Jan. 17, 1968, to which time defts and counsel are excused.

Jan. 17, 1968 Minute entry: On for further trial Jury, Defts and all counsel being present pursuant to recess further proceedings are had. Counsel for defendants renews motions for Judgment of Acquittal and it is ordered said motions be denied. Jury retire at 12:15 P.M. to consider their verdicts. It is that the marshal provide meals for jurors and bailiffs during deliberation of this case at the expense of the govt. At 3:15 o'clock P.M. the jury return a verdict of guilty, on each defendant. Jury polled. It is ordered that the jury be discharged from further consideration of this case and excused until notified. Order that this case be set for sent. Feb. 5, 1968 at 2:00 P.M. Deft remain on bond.

Jan. 17, 1968 File Jury List Jan. 17, 1968 File Verdict of deft Jackson of Guilty.

Jan. 17, 1968 File verdict of guilty as to deft. Clarence Williams.

Feb. 5, 1968 Minute entry: On for sentence. It is ordered that sentencing of defts be continued until Feb. 19, 1968 at 2:00 p.m.

Feb. 19 Minute entry: On for sentence. Lawrence Turoff pres. for Govt. Murray Miller pres. for deft. Jackson. On motion of Mr. Miller, it is ordered that this case be cont. to Feb. 26 1968 at 2:00 p.m. and that Motion for Judgment of Acquittal be heard at 10:00 a.m. on said date.

Feb. 19, 1968 File Motion for Judgment of Acquittal as to deft. Arlene Jackson, and memo.

Feb. 23 File Govt's Opposition to Motion for Judgment of Acquittal.

Feb. 23, 1968 File Deft's Notice of Hearing Motion. for Judgment of Acquittal

Feb. 26, 1968 Minute entry: Motion for Judgment of Acquittal of deft Jackson called for hearing. Defts. both pres. with their counsel. Phillip Malinsky pres. for Govt. Motion argued. It is ordered that said Motion for Judgment of Acquittal is denied. This being time fixed for sentence., defts afforded opportunity to make statement to court etc. and the court renders judgment: deft. Williams committed for period of 10 years; deft. Jackson committed for period of 5 years. Order de.fendants' bail pending appeal be fixed at $5,000 as to deft. Williams and $2,000 as to deft. Jackson. Subsequently, each of the defts. having filed notice of appeal and executed bond pending appeal, said bonds are approved by the court and it is ordered that the defendants be released on bond pending determination of the appeals herein.

Feb. 26, 1968 Enter and file Judgment, deft. Williams: committed for period of 10 years.

Feb. 26., 1968 Enter and file Judgment, deft. Jackson: committed for period of 5 years.

Feb. 26, 1968 Issue commitment in dup. to marshall as to each deft.

Feb. 26, 1968 Iissue notice to marshal re release on bonds pending appeal.

Feb. 26, 1968 File Notice of Appeal by deft. Williams.

Feb. 26, 1968 File Notice of Appeal by deft. Jackson.

Feb. 26, 1968 File bail bond pending appeal of deft. Williams in sum of $5,000 with Nat'l Auto & Casualty Insurance Co. as surety thereon, approved by the court.

Feb. 26, 1968 File bail bond pending appeal of deft. Jackson in sum of $2,000 with Nat'l Auto. & Casualty Insurance Co. as surety thereon, approved by the court.

Feb. 27, 1968 Copy of notice. of appeal as to each deft. delivered to U. S. Attorney. Clerk's Statement of Docket Entries mailed to Clerk U. S. Court of Appeals, San Francisco, Calif. with copy of notice of appeal, as to each deft.

Mar. 18, 1968 File Statement of Points upon which defendant Jackson Intends to Rely, and Designation of Contents of Record on Appeal.

Mar. 27, 1968 File Statement of Points upon which defendant Williams Intends to Rely, and Designation of Contents of Record on Appeal.

Apr. 8, 1968 Enter and file order extending time to file record and docket appeals to and incl. April 27, 1968.

Apr. 10, 1968 File Reporter's Transcript of Proceedings, of trial and sentencing.

Apr. 25, 1968 File Reporter's Transcript of hearing on Motion to Suppress .

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CLARENCE WILLIAMS and
ARLENE JACKSON,
Defendants.

INDICTMENT
NO. C-17755 Phx.

VIO: 21 U.S.C. 174
(Unlawful Concealment
of Narcotic Drugs)

THE GRAND JURY CHARGES:

On or about the 31st day of March, 1967, in the District of Arizona, CLARENCE WILLIAMS and ARLENE JACKSON, the defendants, knowingly and unlawfully concealed and facilitated the concealment of approximately 124,950 grams of heroin and approximately 133.560 grams of cocaine, narcotic drugs, which as the defendants then and there well knew had been imported into the United States of America contrary to Title 21, United States Code, Section 173.

O. T. CHAMBERS
Foreman

EDWARD E. DAVIS
United States Attorney

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CLARENCE WILLIAMS and
ARLENE JACKSON,
Defendants.

NO. C-17755
MOTION TO SUPPRESS
ILLEGALLY SEIZED EVIDENCE

COME NOW the defendants, CLARENCE WILLIAMS and ARLENE JACKSON, by and through their attorney undersigned, and move this Court to suppress all evidence seized in the search of the home of defendant Jackson at 1402 East Granada, Phoenix, Arizona, on or about March 31, 1967, for the reason it was seized as a result of an illegal search in violation of the Fourth Amendment to the United States Constitution and Article II, Section 8 of the Constitution of the State of Arizona. This motion is based upon the file in this case, the transcript of the preliminary hearing in Cause No. 52017 in the Justice Court of East Phoenix Precinct No. 2 entitled States of Arizona vs. Clarence Willams and Arlene Jackson, defendants, and the preliminary hearing transcript in Cause No. 403 and Cause No. 404 in the U. S. Commissioner's Court entitled United States of America vs. Clarence Williams and Arlene Jackson; and Arizona Revised Statutes, Sections 13-1441 through 13-1472, and the attached memorandum of points and authorities.

Respectfully submitted this 11 day of January, 1968.

STEWART & FLORENCE

By KARL N. STEWART
Karl N. Stewart
Attorney for Defendant
Clarence Williams

MURRAY MILLER

By Murray Miller
Murray Miller
Attorney for Defendant
Arlene Jackson

Copy of the foregoing
delivered this 11 day
of January, 1968, to

U. S. Attorney's Office
Federal Building
Phoenix, Arizona

KARL N. STEWART
Karl N. Stewart

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,
Plaintiff

vs.

CLARENCE WILLIAMS,
Defendant.

NO. C-17755 Phoenix
JUDGMENT AND COMMITMENT

On this 26th day of February, 1968, at Phoenix, Arizona came the Attorney for the Goverment and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon plea of not guilty and verdict of guilty of the offense of violating Title 21, Section 174, United States Code (Unlawful concealment of narcotic drugs), as charged.

The Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten (10) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

WILLIAM C. COPPLE
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CLARENCE WILLIAMS and
ARLENE JACKSON,
De Defendants.

No. C-17755-Phox.

STATEMENT OF POINTS UPON WHICH DEFENDANT INTENDS TO RELY AND DESIGNATION OF CONTENTS OF RECORD ON APPEAL

STATEMENT OF POINTS

The Defendant, CLARENCE WILLIAMS, by and through his attorneys, STEWART & FLORENCE, respectfully sets forth the following points upon which he intends to rely in the above entitled case on appeal:

1. The admission by the Court of evidence, oral and documentary, over objection that the proper foundation was not laid;

2. The admission by the Court of evidence, oral and documentary, over the objection that such evidence was irrelevant, incompetent and immaterial;

3. Failure of the Court to enter a judgment of acquittal on Defendant's Motion at the close of the Government's case and at the close of the entire evidence as to all counts of the indictment on which the Defendant was convicted, for the reason that

the evidence was and is insufficient upon which to base a verdict of guilty; and

4. Failure of the Court to grant Defendant's Motion to Suppress the evidence. DATED this 25th day of March, 1968.

Respectfully submitted,

By: KARL N. STEWART
STEWART & FLORENCE
(Karl N. Stewart)
Attorneys for Defendant Williams
1140 East Washington
Phoenix, Arizona

KARL N. STEWART
COPY of the foregoing mailed
this 25th day of March, 1968, 59:
U. S. ATTORNEY
Federal Building
Phocnie, Arizona

KARL N. STEWART
Karl N. Stewart

UNITED STATES COURT of APPEALS

FOR THE NINTH CIRCUIT

CLARENCE WILLIAMS and
ARLENE JACKSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

No. 22,871, 22,870

[October 17, 1969]

Appeal from the United States District Court
for the District of Arizona

Before: BROWNING, CARTER, and HUFSTEDLER, Circuit Judges

HUFSTEDLER, Circuit Judge:

Williams and Jackson were jointly tried and each was convicted for concealing illegally imported heroin in violation of 21 U.S.C. §174. Both of them appeal, raising the issues: (1) Did the District Court err in denying their motions to suppress the heroin as the product of an illegal search? (2) Did the District Court err in denying their motions for acquittal based upon the insufficiency of the evidence to sustain the jury's implied finding of possession?

We hold: (1) The search was not illegal because Williams' arrest was not as a matter of law a pretext for the warrantless search and because the rule of Chimel v California (1969) 395 U.S. 752 does not apply to searches conducted before June we, 1969, the date of the *Chimel* decision; (2) the evidence was insufficient to support Jackson's conviction; and (3) the evidence was sufficient to support Williams' conviction.

Legality of the Search

Jackson and Williams contend that the heroin was the product of an illegal search because Williams' arrest was a pretext for a warrantless search of the Granada Street residence in which he was arrested and because the scope of the search went beyong that properly incident to the arrest.

The Government had probable cause to believe that Williams was a party to a sale of heroin on March 9, 1967. He was not then arrested, but he was kept under surveillance by federal and state law enforcement officers to try to find out the source of the narcotics. On March 30, 1967, federal narcotics agent Watson obtained a warrant for Williams' arrest for the sale on March 9. Federal, state and city officers met at the Federal Building in Phoenix, Arizona, about 8:00 p.m. on March 30 for the purpose of planning the execution of the arrest warrant. There is a conflict in the evidence as to whethe.r a search of the Granada Street residence was discussed at that meeting Police Officer Gutierrez testified that the residence search was discussed and planned. Other law enforcement officers testified thatt here was no discussion about searching the Granada Street residence.

After the meeting, the officers circulated in various locations known to be frequented by Williams. During the period from 5:50 p.m. to 11:40 p.m. defendant Williams was constantly on the move. It was not until he returned to the Granada residence shortly before midnight that the officers located him. Shortly after midnight eight. officers entered the residence to arrest Williams. Williams was discovered in the living room. The search began almost immediately and lasted for about one hour and forty-five minutes. Federal agent Watson testified that they were looking for contraband, in particular, narcotics, and for Government money which had been used to purchase narcotics.

Defendant Williams contends that this evidence shows that "the arresting officers, knowing they did not have probable cause to obtain a search warrant [for the Granada residence], used the

arrest as a vehicle to circumvent the requirements of obtaining a search warrant." The Government agrees that an arrest may not be used as a pretext to search for evidence without a search warrant where one would ordinarily be required under the Fourth Amendment.

Whether or not an arrest is a mere pretext to search is a question of the motivation or primary purpose of the arresting officer. Improper motivation has been found where the arrest is for a minor offense which serves as a mere "sham" or "front" for a search for evidence of another unrelated offense for which there is no probably cause to arrest or search. (*See Amador-Gonzales v. United States* (5th Cir. 1968) 391 F.2d 308; *Taglavore v. United States* (9th Cir. 1961) 291 F.2d 262.) It has also been found where the arresti.ng officer deliberately delays making the arrest in order to allow the arrestee to enter the premises which the officer desires to search. (*Compare McKnight v. United States* (D.C. Cir. 1950) 183 F.2d 977 *with United States v. We.aver* (4th Cir. 1967) 384 F2.d 879, *cert. denied* (1968) 390 U. S. 983.)

There is ample evidence to sustain the District Court's finding that the arrest was not a pretext for the search. The search for contraband was related to the nature and purpose of the arrest. The delay in obtaining the arrest warrant was justified by the quest for more evidence and by the investigation to ascertain the source of the narcotics. The officers proceeded with due diligence to execute the warrant after it was issued by serving Williams wherever he could be found. There is not evidence that the officers deliberately passed up an earlier opportunity to arrest Williams on the warrant. We cannot hold as a matter of law on this record that the primary purpos.e of executing the warrant upon Williams when he returned to the Granada residence was to search that house. (!RCompare United States v. Costello (2d Cir. 1967) 381 F.2d 698 *with United States v. James* (6th Cir. 1967) 378 F.2d 88.)

Williams was arrested in the living room of the Granada residence. Following his arrest, the officers searched the whole house. The heroin was found in a container on. a closet shelf in the northeast bedroom. *Chimel v. California,. supra,* held that a search of the house in which a defendant is arrested is no longer within the bounds of a search incident to an arrest and that the constitutional perimeter of such a search is the person of the arrestee and the area "within his immediate control." (395 U.S. at 763.) The Williams search is illegal under the *Chimel* standard, and the heroin should have been excluded from the evidence if the *Chimel* rule applies retroactively to searches conducted before June 23, 169.

The Supreme Court has expressly left open the question of *Chimel's* retroactivity. (Shipley v. California (1969) 395 U.S. 818; *see also Von Cleef v. New Jersey* (1969) 395 U.S. 814.) However, in *Desist v. United States* (1969) 394 U.S. 344, the Court reiterated the guidelines for determinint retroactivity of a new constitutional rule first stated in *Linkletter v. Walker* (1965) 381 U.S. 618:

"The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standrads and (c) the effect on the administration of justice of a retroactive application of the new standards." (394 U.S. at 249.)

The Court in *Desist* said the foremost of the three criteria was the first. If the purpose is to deter misconduct of police officers in conducting a search, the new exclusionary rule will no the given retrospect effect because that purpose is not advanced by penalizing conduct that has already occurred. The exclusionary rule in soch cases, the Court observed, was a procedural device to curb illegal police action and not a rule affecting the integrity of the process for finding the innocence or guilt of an accused.

We are unable to see any meaningful difference between the

purpose or the effect of the exclusionary rule announced in *Katz v United States,* (1967) 389 U.S. 347, affecting the admissibility of evidence obtained by electronic eavesdropping, and the exclusionary rule announced in Chimel, affecting the admissibility of evidence obtained by a search not reasonably incident to an arrest. We conclude, therefore, that the rule of retroactivity stated in *Desist* with respect to *Katz* applies in full measure to Chimel. Accordingly, we hold that the rule of *Chimel* applies only to those searches claimed incident to an arrest, conduct after June 23, 1969.

The legality of the search incident to Williams' arrest controlled by the pre-*Chimel* standards stated in *United States* v. *Rabinowitz* (1950) 339 U.S. 56 and *Harris v. United States* (1947) 331 U.S. 145: Was the search reasonable under the totality of the circumstances? We think it was. The arrest was for the sale of heroin, and the object of the search was the discovery of the contraband and of the Government money used to purchase heroin. As in *Harris,* the nature of the fruits of the crime makes it likely that "they would have been kept in some secluded spot." The search covered the house in which Williams was found and in which he gave every appearnace of residing. The search was not of an area more extensive than that permitted in *Harris.*

Sufficiency of the Evidence

The Government's case against both Jackson and Williams rested exclusively upon the presumption from proof of possession stated in section 174. It was therefor incumbent upon the Government to prove beyond a reasonable doubt that each defendant possessed the heroin.

The Government had to prove that each defendant was in constructive possession of the heroin, because neither defendant had actual possession of the narcotic. One has constructive possession of contraband if he knows of its presence and has power to exercise dominion and control over it. (*Figueroa v. United*

States (9th Cir. 1965) 352F.2d 587; *Arellanes v. United States* 9th Cir. 1962) 302 F.2d 603, *cert. denied* (1962) 371 U.S. 930; *Hernandez v .United States* (9th Cir. 1962) 300 F.2d 114.)

Here is the evidence bearing upon the possession issue: When the federal narcotics agents rapped on the door of the Granada residence shortly after midnight on March 31, 1967, Jackson answered the door and admitted the officers. She was fully clothed. The agents walked into the living room and placed Williams under arrest. He was sitting on a sofa in the living room eating a meal from a tray and watching television. He was wearing underwear, a robe, and slippers. After his arrest, Williams went to the northeast bedroom and dressed himself in clothing he took from the closet and the dresser int hat room. Both the closet and the dresser contained men's and women's apparel. The heroin was later discovered on the shelf of the closet from which Williams took some of his clothes.

Before the night of Williams' arrest, the Granada house had been placed under surveillance. Jackson had been seen either entering or leaving the house on four or five occasions. There was no evidence that the women's apparel in the northeast bedroom was hers. There was no evidence that she owned or rented the house, or that Williams did so. Jackson's relationship, if any, to Williams was not proved.

To sustain the jury's finding of Jackson's guilt, we would have to decide that from the facts that she was in the house after midnight, that she had been seen entering and leaving the house on several prior occasions, that there was feminine apparel in the northeast bedroom, the jury could reasonably have concluded that she was living in the house and sharing Williams' bedroom, that she had at least joint power to control the closet and its contents, and that she knew the heroin was there. Further, we would have to be satisfied that the jury could have reached those conclusions free from any reasonable doubt, *i.e.*,

that kind of doubt " 'that would make a person hesitate to act' in the more serious and important affairs of his own life." *United States v. Nelson* (9th Cir. 1969).....F.2d....., quoting, in part, from *Holland v. United States* (1954) 348 U.S. 121, 140.) The evidence against Jackson does not rise to that standard, and the case against her collapses.

The evidence of Williams' possession is very different from that of Jackson's. Williams was obviously at home in the Granada residence. He used clothes from the closet in which the heroin was found. He could have reached for the heroin as easily as he reached for his coat. The only ingredient of constructive possession which had to be proved circumstantially was his knowledge of the presence of the heroin. The jury could properly conclude that it was more probable than not that he had the requisite knowledge. From the presence of feminine apparel in the same closet, an inference can be drawn that a woman had access to the closet. But that inference does not contradict the inference that Williams knew that the heroin was in his closet and we cannot say that the inference is so strong as to raise a reasonable doubt that Williams did not know the contraband was there.

The judgment against Jackson is reversed. The judgment against Williams is affirmed.

UNITED STATES COURT of APPEALS

FOR THE NINTH CIRCUIT

CLARENCE WILLIAMS,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee.

No. 22871

APPEAL from the United States District Court for the District of Arizona.

THIS CAUSE came to be heard on the Transcript of the Record from the United States District Court for the District of Arizona.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby if affirmed.

Filed and entered Oct. 17, 1969.

UNITED STATES COURT of APPEALS

FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Wednesday, December 24, 1969.

Before: BROWNING, CARTER, and HUFSTEDLER, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction o fthe Court, IT IS ORDERED that the petition of appellant filed November 6, 1969 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

March 24, 1970

Philip M. Haggerty, Esq.
Miller & Haggerty
210 Luhrs Tower
45 West Jefferson St.
Phoenix, Arizona 85003

RE: CLARENCE WILLIAMS v. UNITED STATES
No. 1125, October Term, 1969.

Dear Mr. Haggerty:
The Court entered the following order in the above-entitled case yesterday:

"The petition for a writ of certiorari is granted. The case is placed on the summary calendar and set for argument immediately following No. 1142."

Very truly yours,

JOHN F. DAVIS, Clerk

By HELEN K. LOUGHRAN
(Mrs.) Helen K. Loughran
Assistant Clerk

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,
Plaintiff,

v.

CLARENCE WILLIAMS and
ARLENE JACKSON,
Defendants.

No. C-17755
MOTION
TO
SUPPRESS

Courtroom Number 3
United States Courthouse
Phoenix, Arizona
January 12, 1968

BEFORE:

HON. WILLIAM P. COPPLE, Judge

APPEARANCES:

On behalf of the Plaintiff:
PHILIP S. MALINSKY, ESQ.
On behalf of the Defendant Williams:
KARL N. STEWART, ESQ.
On behalf of the Defendant Jackson:
MURRAY MILLER, ESQ.

* * * 7

this address?

[Witness Harry Watson, Federal Narcotics Agent]

A. Yes, I did.

Q. And when did you do so?

A. The late afternoon of March 30, 1967.

Q. And where was this?

A. The Federal Building, Phoenix, Arizona.

Q. That would have been Commissioner Thomas?

A. Yes.

Q. And who was present with you when you obtained this warrant?

A. Commissioner Thomas and myself, to the best of my recollection.

Q. And this was a warrant of arrest for whom?

A. Clarence Williams.

Q. What was the warrant of arrest for?

A. Well, what was it predicated on, or who was it for?

Q. Well, what was the charge?

A. Illegal sale of heroin.

Q. To have alleged to have taken place when?

Q. To have alleged to have taken place when?

A. March the 9th, 1967.

Q. The alleged sale was not made to you, was it?

A. No.

Q. So that the knowledge of this sale, then, came to you through information and belief on your part?

A. It came to me on direct information from a narcotic

* * * 7

* * * 12

Q Is it also then your practice, Officer, to make the arrest as soon as possible after the warrant is issued?

A. Under the law I am required to do this.

Q. Now, did you obtain any further information in connection with this sale made on March 9th between March 9th and

the time that you had the warrant issued?

A. Further information regarding the sale on March 9th?

Q. Yes, sir.

A .No.

Q. Were you in town from March 9th to March 30?

A. Most of the time, I believe.

Q. And what reason do you have for not obtaining a warrant sooner, say March 9th or March 10th or March 11th?

A. Between March 9 or March 30 we were still conducting our investigation, we had not culminated this investigation.

Q. Were you looking then for more evidence for the March 9 sale, is that what your are telling us?

A. No.

Q. And from March 9th until March 30th, did you have a Mr. Williams and — did you have Mr. Williams under surveillance?

A. Periodically.

Q. And can you give us some indication as to what that consisted of?

A. Watching him from time to time when he was in town.

Q. Did you personally conduct this surveillance on him at any time between March 9th and March 30?

A. Yes, I did.

Q. Can you tell us, do you know the dates?

A. No, I don't.

Q. Approximately how many times did you have him under surveillance?

A. Several times during that period.

Q. And by several times, could you give us an estimate?

A. More than two, possibly four or five times.

Q. And where di you conduct this surveillance?

A. City —

Q. With Mr. —

A. City of Phoenix.

Q. What specific places did you have him under surveillance?

A. Primarily on the east side, south side.

Q. Well, location-wise, where would that be, his house, on the street, in his place of business, or where?

A. Several locations on the east side of Phoenix primarily.

Q. Can you name them for me?

MR. MALINSKY: Your Honor, I am going to object to this line o fquestioning. I think the issue is whether the warrant for arrest was immediately executed after it was obtained and is not —

THE COURT: Yes. I am curious, Mr. Miller. Is there any requirement that immediately when the evidence of a crime is committed, particularly of the type of this, that it's continuing and may be widespread, that they must immedicately cease all further investigations and immediately arrest for that? Doesn't the law enforcement agency have any discretion at all as to further investigation in the hopes of finding further crimes or further participants or verifying chemically or whatever it happens to be, I mean how is the period in between the alleged commission of the alleged crime and the issuance of the arrest warrant material? Now, I can see your point from the time of that issuance of the arrest warrant possibly, but I can not see that there is any requirement that they must immediately go arrest and cease all further investigations into an area like this.

MR. .MILLER: Well, we would submit to the Court that the Court would have to be apprised of all the facts and the circumstances surrounding the case, and specifically we are referring to our contention that the investigation that was allegedly conducted and the reasons for the arrest at the place that it occurred and at the time that it occurred was solely, exclusively and primarily, if nothing else, to be albe to search the premises without obtaining a search warrant.

Since the premises — well, these facts and circumstances, e would like to bring out, but the reasons we would submit that

the officers had the ability and the authority and at —

THE COURT: Yes, but are they required, are they required to stop and investigate immediately and or make an arrest?

MR. MILLER: Well, let me say first, no, your Honor, no, but if the facts and circumstances for the reasons of obtaining the warrant and arrest at that time and at that place —

THE COURT: Well, I will let you go ahead. I want to give you as much leeway on it—

MR. MILLER: Well, I want to make my position clear, if they used this particular method at the time and place as the subject for searching the premises.

THE COURT: Well, I will let you go on, the objection is overruled.

MR. .MALINSKY: Well, may I clarify? I think one of the defendants, Arlene Jackson, is not present at this time. I wonder if counsel waives her presenct at this time?

MR. STEWART: We waive her presence.

THE COURT: All right.

The objection is overruled. Then go ahead.

you tell me specifically where they were?

A. I couldn't remember all of them, counsellor, the Washington Social Club, the 1200 block on East Madison, the 1400 block on East Granada, north on 7th Street, south of McDowell, in that general area. .

Q. And did you also have him under surveillance at the 1402 East Granada, Offocer?

A. Between March 9 and 303

Q. Yes.

A. That's correct.

Q. You personally had this — had him under surveillance at that address also?

A. That's correct.

Q. And how many times would you say that you had him under surveillance at that address?

A. During that period of time?

Q. Yes, sir.

A. Two or three times.

Q. Would it be fair to say that you personally kept your eye on this person for more than a dozen times between the date March 9th and March 30th?

A. No, I wouldn't say that, Mr. Miller. I believe during this period of time that Mr .Williams was out of town for several days.

Q. Well, aside from that, you observed him several times at this Granada address and several times in the various east parts of town, to add them all up, would they come out to at least more than a dozen times, Officer?

A. Six or seven occasions.

Q. Aside from yourself conducting this surveillance you had other officers that conducted their surveillances of this person at such times as you were not present?

A. Sporadic surveillance by several other officers.

Q. And by whom?

A. Sergeant Harris of the Phoenix Police Department, Officer Young, Agent Jordan on one occasion, I believe..

Q. Anyone else, Officer?

A. Not that I can remember off hand.

Q. And do you know how many times Officer Harris conducted any surveillances on Mr. Williams?

A. No.

Q. How many times Officer Young or Officer Jordan conducted surveillances?

A. I couldn't speak for Officer Young, I believe Agent Jordon was one time.

Q. Was Arlene Jackson under surveillance?

A. On one or two occasions in that period.

Q. Just on one or two?

A. That's correct.

Q. Did you conduct this surveillance?

A. One of them, yes.

Q. When and where?

A. I don't remember the date, it was prior to March the 30th, I believe she left the Granada location and went to a market somewhere on 7th and returned to the house.

Q. When you are telling us what you believe, are you telling us you observed her leave the Granada location and go to a market and then come back, or what?

A. That's approximately where she went, I don't remember the date.

Q. Can you give us your best estimate?

A. Two or three days prior to March 30.

Q. Was anyone with you at this time?

A. No.

Q. When she left the house, did you follow her then?

A. Yes.

Q. And do you know what market she went to?

A. No.

Q. And you followed her back to the home?

A. That's correct.

Q. When was the other time that you had her under surveillance?

A. This was prior to March the 9th.

Q. What would be your best estimate?

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A. Excuse me?

Q. Yes, sir.

A. On March the 30th at about 11:45 p.m. I saw Mr. Williams for the first time that day.

Q. And where di you see Mr. Williams, sir?

A. 1403 East Granada.

Q. You mean in the house?

A. Arriving there in his Cadillac.

Q. Had you seen him prior to that time on that day?

A. No, I did not.

Q. Do you know whether or not any officers had him under surveillance at that day?

A. I don't know.

Q. You made no inquiry?

A. I don't believe so.

Q. When was this warrant of arrest in point of time, when was it issued?

A. As I recall, between 4:00 and 4:30 p.m. on March 30.

Q. And can you tell us — strike that.

Did you inform the other officers that you were going to obtain a warrant for Mr. Williams' arrest on March 30?

A. Prior to obtaining the warrant?

Q. Yes, sir.

A. No. Other than Agent Jordan.

Q. Okay. When did you so inform him?

A. The afternoon of March 30.

Q. By that you mean about 1:00 or 2:00 o'clock?

A. About noon time.

Q. And when did you decide to obtain the warrant?
A. March 30.

Q. I mean when, about noon time?

A. Well, during the morning, the latter part of the morning.

Q. And why is it that you did not obtain the warrant until approximately 4:00 or 4:30?

A. By the time I was able to leave my office, it was approximately 10 minutes to 4:00 that afternoon..

Q. You mean you wre busy with other work?

A. That's correct.

Q. Now, when you knew of the warrant being issued at approximately 4:30, what did you do to try to execute the warrant?

A. Made arrangements to meet with the Phoenix officers and the State Agents, Agent Jackson, arranged the vehicles.

Q. You say you made arrangements with Agent Jackson; is that correct?

A. That's correct.

Q. And who else?

A. Agent Jordan, Sergeant Harris, and I believe Captain Morgan from the State.

Q. And these arrangements that you say you made, was it by telephone?

A. I called them and arranged them to meet at a certain location.

Q. Oh, you called them at about what time?

A. Between 4:30 and 5:00.

Q. And where did you make arrangements to meet them?

A. As I recall, at the Phoenix Police Department.

Q. And what time did you make arrangements to meet them?

A. I don't think it was any definite time set, later on, Agent Jackson had not arrived from Los Angeles at that time.

Q. Well, let's see. When you called Officer Jordan and Harris and Morgan to make arrangements to meet them at the Police Department, what did you say as far as meeting them?

A. As I recall, we were going to meet there after supper, there was no time set, Agent Jackson had not arrived.

Q. All right. Then did you meet after supper at the Phoenix Police Department?

A. That's correct.

Q. And this was about what time?

A. I would think it would be around between 8:00 and 9:00 p.m.

Q. And who was present at this time?

A. Agent Jordan, Agent Jackson, Sergeant Harris, Officer Young, Officer Quinonez, Officer Stokes, I believe the two State Agents were there, Moody and Robinson.

Q. I am sorry, what was the first name?

A. Moody and Robinson.

Q. Now, Officer, from your wealth of experience in this type of arrests and narcotics, when you obtain a warrant, a Federal warrant for arrest, Officer, to arrest a party, and you state that once the warrant was issued, you are supposed to make as immediate an arrest as you can, who do you use to make the arrest? Do you have anybody in the Federal Government that helps you make arrests, you, know, like U. S. Marshal's people?

A. We arrest our own defendants.

Q. All righty. And in the Federal Government when you are making arrests under the Federal warrants, what do you do then? Do you accumulate normally a Federal Agent, be it narcotics or FBI people or Marshals, go out and assist you when you think it's necessary?

A. No.

Q. Pardon me?

A. No

Q. Well, who assists you?

A. Normally the local police and or State Agents in the area..

Q. And the reason you use them is to give you assistance in case something physically might happen?

MR. MALINSKY: I think the question is what happened in this case, not what is normally done, your Honor. I am going to object to this line of questioning.

THE COURT: Yes. The objection is sustained.

Let's get back to our own case, Mr. Miller, if we may. We will be here a long time this evening if we don't.

Q. BY MR. MILLER: Now, at this meeting that you had after supper at the Phoenix Police Department, I take it that you then go over ast o how this arrest was going to take place?

A. We discussed it.

Q. Was Agent Jackson, had he arrived at this time?

A. He was in Phoenix at that time.

Q. Did he come down to this meeting?

A. What was that, sir?

Q. I said, did he come down to this meeting?

A. He flew from Los Angeles to Phoenix.

Q. Well, all right. He is in Phoenix, but did he come to this meeting that you had at the Phoenix Police Department?

A. I don't believe he went to the Police Station, no, for obvious reasons.

Q. For obvious reasons, it that what you said? I didn't —

A. I don't believe Agent Jackson would be walking to the Phoenix Police Department, no.

Q. All right. So your testimony was he was not present at this meeting that you had after supper at the Phoenix Police Department; is that correct?

A. Not at that meeting, no, sir.

Q. All right. Well, did you have a subsequent meeting before the arrest?

A. With Agent Jackson?

Q. Yes.

A. Yes.

Q. And at this meeting with all these officers now, were you the agent in charge?

A. For practical purposes, I was.

Q. And how were you planning to arrest this defendant?

A. I don't understand your question, counselor.

Q. How were all these people in this meeting that you had, I guess you discussed how you were going to arrest them, didn't you?

A. Well, we discussed how we were going to locate him.

Q. Okay. How did you arrive at that?

A. Several people entered several different vehicles with the idea of searching several different locations to ascertain the whereabouts of Mr. Williams

Q. And who were they?

A. Who was which?

Q. The several people that —

A. The officers that I enumerated that we met from the Phoenix Police Department and the State Narcotics, what vehicles they entered, I could not tell you.

Q. All right. And then how were you supposed to meet again?

A. We all had radio contact, two-way mobile radio.

Q. Was there any discussion about searching the home on Granada?

A. No.

Q. Now, then when these officers left then to try to locate Mr. Williams, then did you leave, too?

A. Yes.

Q. Adn where di you go?

A. Several locations in the Phoenix area to locate Mr. Williams.

Q. Well, where?

A. Primarily East Phoenix, Granada Street address.

Q. And it's your testimony, Officer, that before you —

A. Excuse me, Mr. Miller.

Q. Yes.

A. I waited — I would like to finish — I waited until

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Q. At the time that you announced that you were a Federal Agent, sir, who was with you?

A. Sergeant Harris.

Q. Anyone else?

A. Not in the immediate vicinity.

Q. And then what happened?

A. Arlene Jackson came to the door and said who was it. I again told her who I was and why I was there and told her to open the door. At this time I am observing Mr. Williams, who had not moved. Arlene Jackson opened the door, entered the house, placed Williams under arrest pursuant to the warrant.

Q. And did you say Mr. Williams had not moved then from the time that you announced who you were until you placed him under arrest?

A. That's correct.

Q. And where was Mr. Williams at the time that you observed him?

A. Sitting on the sofa with his back to the front window watching television, eating.

Q. And he had some of his clothing removed?

A. He had what, sir?

Q. He was not fully dressed?

A. He was seated there with a T-shirt and shorts on and a dressing robe, slippers.

Q. By shorts, you mean his undershorts and no pants?

A. In his underclothes and a dressing robe.

Q. And then you arrested him right then and therein the living room?

A. That's correct.

Q. And handcuffed him?

A. That's correct.

Q. And what did you do with him then?

A. I then informed him of his rights, told him why he was under arrest.

Q. And can you tell me what you said to him?

Excuse me. Who was present at this tiee?

A. Agent Jordan, Sergeant Harris, and myself in the immediate area.

Q. Were there any other officers in the home or outside the home, to your knowledge?

A. Yes, I believe there was several other officers in the home at that time.

Q. Did you know whom or not?

A. The other officers whim I have just enumerated to you that went with us on the surveillance.

Q. All right, sir. What rights did you tell him?

A. I advised Mr. Williams that he was under arrest for violation of the Federal narcotic laws, that the warrant of arrest was in the custody of the Marshal at Phoenix, that any statements that he made could be used against him, that he could have the services of an attorney, and if he didn't have the funds to have one, that one would be appointed by and for him by the Commissioner at his arraignment.

Q. Then what happened?

A. He didn't say anything

Q. Then what did he do?

A. He then asked me if he could finish his supper.

Q. Did you let him?

A. Yes.

Q. Then what happened?

A. The search of the house was conducted pursuant to the arrest.

Q. Did you conduct the search?

A. Very brief part of it.

Q. Did you order or authorize the search?

A. Yes.

Q. Why?

A Pursuant to a lawful arrest, under the Federal law, we searched the premises where Mr. Williams lived.

Q. For what reason?

A. The contraband, proofs of the crime, specifically narcotics, Government money, and any other contraband that may be in the house.

Q. Were you looking for anything in particular, and, if so, what?

A. Just commencing a normal search for contraband in a narcotic case pursuant to an arrest.

Q. Officer, where was Mrs. Jackson when you place Mr. Williams under arrest?

A. Where was she?

Q. Yes.

A. I believe she was somewhere in the living room, as I recall.

Q. And at the time that you — that is, the living room that Mr Williams was in; is that right?

A. I believe that the dining room and living room are one unit, they are not partitioned off.

Q. And when you placed Mr. Williams under arrest and handcuffed hime, he was then secure?

A. He was what, sir?

Q. He was then secure?

A. Secure in what way?

Q. Well, secure as a prisoner under arrest?

A. I searched him, put the handcuffs on him, and he sat down on the couch.

Q. Do you know who owned the home, I mean of your own knowledge?

A. Who actually has the mortgage?

Q. Yes.

A. No.

Q. Did you know whose home it was?

A Who what?

Q. Whose home it was?

A. My investigation really — revealed that Arlene Jackson and Clarence Williams live there.

Q. Well, —

A. Although the utilities were in her name.

Q. So your investigation revealed that specifically what — how did you ascertain that?

A. A check of the — excuse me.

MR. MALINSKY: I am going to object to this line of questioning. I think they have lived there, there has been testimony that they lived there.

THE COURT: Oh, he can answer the question.

A. A check of the local utility company.

Q. BY MR. MILLER: Now, when you placed Mr Williams under arrest, what did you tell Mrs. Jackson? I mean did you order her to do anything or place her under arrest, or what did you do with her?

A. No.

Q. What did you do with her?

A. I didn't tell her anything.

Q. Did you tell her to sit down, be quiet?

A. I don't believe that I told her that, no.

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the house, then?

A. The dining room is over in this corner, what would be the dining room, if you had a dining room talbe.

Q. And then the kitchen with —

A. The kitchen was somewhere in the back, I never went to the kitchen.

Q. I see Is there another storage room at the rear of the house?

A. I believe that in this portion of the house there is either a service porch and or a storage room, which probably is part of the kitchen. I don't know what the area would be used for. I know there were several cabinets in there.

Q. Have you been in there or —

A. No, I can see it from here (indicating living room).$-

Q. All right. Thank you.

NOTE: The witness resumes the stand.

Q. BY MR. MILLER: Officer, you did not have, I take it, a search warrant with you at the time that you searched the premises?

A. No, I did not.

Q. And I take it that to your knowledge Mrs Jackson gave neither you nor any of the other officers permission to search the premises; is that correct?

A. She didn't give me permission to search the premises, no.

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DIRECT EXAMINATION

Q. BY MR. MILLER: State your name and address and occupation, if you will.

A. John S. Harris, 17 South 2nd Avenue, sergeant with the Phoenix Police Department, narcotics detail.

Q. How long have you been so employed?

A. 1959.

Q. Do you know a person by the name of Clarence Williams and Arlene Jackson?

A. Yes.

Q. Did you have an occasion to be present at the arrest of Clarence Williams on March 30,31of'67?

A. Yes, sir.

Q. Where wast that at, sir?

A. I believe it's 1402 East Granada.

Q. And at that address, sir, did you have occasion to be surveying that area sometime prior to March 30?

A. Yes, sir.

Q. For what purpose?

MR. MALINSKY: Now, if the Court please, I understood that you were going to restrict this hearing to the time—

THE COURT: Well, I think you should specify the time prior to that date, prior to that date is when? Are you talking about on the 30th or the 29th, or when are you talking about?

Q. BY MR. MILLER: Approximately 60 days, within a 60-day period before MKARC ?fl3

MR. MALINSKY: I will object to the question.

THE COURT: He may answer.

A. Yes, sir.

Q. BY MR. MILLER: For what purpose?

A. To determine if Williams resided at that location, to determine when he would leave and return, this sort of thing.

Q. Was the additional purpose to — was he a suspect for narcotics dealsings to you in your office3

A. Yes, sir.

Q. And it would be then fair to say that you were investigating him to see whether or not there would be any evidence to arrest him for narcotic traffic; is that correct?

A. I would say that he was under sruveillance from time to time.

Q. And was this for the State narcotic, Arizona?

A. Phoenix Police Department.

Q. All right. And during approximately this period of time, say within 60 days prior to the arrest on March 30 or March 31, how often were you at this address?

A. I don't know that length of time.

Q. What would be your best estimate?

A. Probably maybe four or five times.

Q. And how would you situate yourself?

A. I don'g understand your question.

Q. Well, I take it you had a stake out when you were there, is that correct, if I may use that term?

A. At times, yes, sir.

Q. Well, during these three or four times that you were out there, where would you locate yourself?

A. At different locations in view of the residence.

Q. Were you ever in the residence prior to the arrest on the evening of March 30 and the morning of March 31?

A. No, sir.

Q. Was anybody in the Police Department to your knowledge prior to that date?

A. No, sir, not to my knowledge.

Q. Sir, when were you first aware that Mr. Williams was going to be arrested?

A. I would say it was about 8:00 p.m. or around that on the 30th of March.

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Q. Who else was present when you had a conversation with Officer Watson?

[Harris]

A. I don't believe anybody was in the office other than the secretary, I believe, was in the next — next room.

Q. When was this, Friday evening?

A. No, this was this morning before 8:30, 8:40, something like that.

Q. How long did the meeting last, that is, the officers' meeting, the meeting on March 30?

A. I don't know, maybe — maybe a half hour, guessing.

Q. And during this half hour, what else did you say?

A. What else other than what?

Q. Other than what you have told us?

A. I don't recall anything.

Q. Were you planning to search the house?

A. Pardon?

Q. Were you planning to search the house on Granada?

A. When?

Q. The evening of March 30 and the morning of March 31?

A. The morning of March 31, yes, sir.

Q. What was said about planning to search the house?

THE COURT: You are referring now, I assume, counsel, during the meeting?

MR. MALINSKY: When was —

MR. MILLER: Yes, sir.

Q. During the meeting, what was said about palnning to search the house?

A. Well, we couldn't plan to search the house at that time, we hadn't located the defendant.

Q. Well, then if you were going to locate the defendant in the house, was anything said about planning to search the house at that meeting you had with the other officers?

A. Not that I recall.

Q. And when you say nothing you can recall, Officer, are you stating there could have been some conversation, but you can't bring it back now, or are you certain there was not conversation?

A. Well, I am not certain. However, I don't think we discussed any plans of search.

Q. And what did you do then after this meeting, Oncer, with reference to ascertaining the whereabouts of Mrs. Williams?

A. We went to the —

Q. Who is we, you and Officer Watson?

A. Yes, and all of the other officers involved, well, that went to search, to look for —

Q. Where did you go?

A. I believe to first — first to the Granada address.

Q. Who did you go with?

A. Pardon?

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Q. BY MR. MILLER: Other than the Federal warrant, yes, sir.

A. No, sir.

Q. And I take it, then, you had no warrant of arrest or no search warrant to search the premises alone; is that correct? When I say "alone," I am referring to the Phoenix Police Department.

A. That's correct.

Q. Nor did you have any basis to obtain a search warrant, is that correct, to search the premises?

A. I didn't, no, sir.

Q. Now, did you enter the home with Officer Watson?

A. Yes, sir.

Q. That is the front door?

A. Yes.

Q. And would you tell us what you did then as you approached the front door?

A. I believe Agent Watson knocked on the door, either he or myself, Arlene came to the window, which is just west of the door, and flipped the blinds open, I believe one slat of the venetian blinds, and looked out; and Agent Watson was advising them as to who he was and she went — walked back at least out of sight from all appearances away from the door. Agent Watson knocked again and announced as to who he was and the purpose—

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[Witness — Manuel Quinonez, City of Phoenix Police Dept.

A. I don't recall, sir.

Q. And did you take anything else from the house?

A. I haven't refreshed my memory, but to the best of my recollection, I recall another pipe, I believe, it was taken from the kitchen.

Q. Pardon me?

A. A pipe with green leafy substance inside of it.

Q. Anything else taken, to your knowledge, from — by you?

A. By me?

Q. (Nods.)

A. To the best of my recollection, those were the only three items.

Q. How long were you there at the house?

A. Two or three hours.

Q. And during this time, either you or other officers in your presence were more or less searching the place?

A. Yes, sir.

Q. And during this period of time, where was Mr. Williams, to your knowledge?

A. Mr. Williams was, to my knowledge, was in the living room

Q. Being guarded by other officers?

A. He was under arrest, yes, sir.

Q. And where was Mr. Jackson, to your knowledge, dur

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[Witness — Ralph McMillan, State of Arizona Narcotics Officer.

A. Fine.

Q. When did that meeting take place?

A. I believe it was in Agent Watson's office in the Federal Building.

Q. And who was present there?

A. Agent Watson, Agent Phil Jordan, Mr. Fred Dic, myself, Sergeant Harris, Officer Stokes, Officer Yount, I am not sure who else was there.

Q. Okay. Now, what took place at the meeting?

A. I believe it was Agent Watson that said they had a warrant for Mr. Williams' arrest, we were attempting to locate him. Several cars went out looking for him trying to find him.

Q. Excuse me. Just at the meeting, what else was discussed?

A. Primarily all there was.

Q. Nothing was said about setting up another buy?

MR. MALINSKY: I object to getting into this, you Honor. I don't thin —

THE COURT: Well, you are leading your witness. He is your witness, and you are leading him. The objection at least is sustained on the basis of leading your witness.

MR. MILLER: I am trying to refresh his recollection, your Honor. This is certainly —

THE COURT: Well, you have nothing to refresh his

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about this meeting that you had in the Federal Building and said something to go over the search. What did you mean by that?

[Witness — Robert Guttierrez, City of Phoenix Police Dept.]

A. Would you repeat that, please?

Q. Yes. When the attorney asked you about this meeting in the Federal Building, he said something about to go over the search. What did you mean? What kind of search were you going over?

A. Well, search for narcotics.

Q. Yes. Well, this meeting, who was telling you about this, or just how — what was the discussion, just briefly?

A. I couldn't tell you off hand exactly what went on, but it was briefly or more or less that we were to serve a search warrant later o nthe night on Clarence Williams, and we were to stay on the air for — you know, to get together on the search.

Q. And was there anything said generally speaking about what you were going to be searching for when the search warrant was going to be served?

A. Narcotics.

Q. And who was more or less in charge of this meeting? Was it Agent Watson or Officer Harris, do you know?

A. I would say Agent Watson, yes.

Q. And was he the one that was telling you this?

. No. He was — well, he spoke to everybody —

Q. Yes, what did he say?

A. — in the room.

And then —

Q. I don't mean exactly, I mean generally what was he saying in connection with the search?

A. Agin, that he would like our assistance in serving a search warrant later on in the night.$- Q. Okay. And di he let your know where you were going to search ,what home or hwere?

A. Yesa. The address was mentioned and the person also to be served on.

Q. What address was mentioned?

A. I don't recall the address, but it was in the vicinity of 14th Street and Granada, I believe it was northwest corner, the corner house.

Q. Did he say about what time this was going to happen?

A. They didn't mention any specific time, but they just said stay on the air for a meeting later on and get together to serve a search warrant.

MR. MILLER: Thank you very much, Officer.

No questions.

THE COURT: Mr. Stewart?

MR. STEWART: No further questions.

THE COURT: Mr. Malinsky?

MR. MALINSKY: No. No questions.

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[Witness. Harry Watson

A. Yes.

Q. Did you meet with him at any time on the evening of March 30, 1967?

A. Yes.

Q. Where did that meeting take place?

A. I believe in the Federal Building a tmy office.

Q. At approximately what time was that?

A. Approximately 8:00 o'cloc, shortly thereafter.

Q. Did you have a search warrant for a search of the premises at 1402 East Granada that eventhin?

A. No, I did not.

Q. Did you have an arrest warrant for the arrest of Clarence Williams for violation of narcotics laws?

Q. Yes, I did.

Q. Did you give instructions to Officer Gutierrez or any one else that a search warrant was to be executed on 1402 East Granada that evening?

A. No, I did not.

Q. What were your instructions?

A. I didn't give any instructions to any of the city or the State agents. I told the sergeant and the State lieutenant that we were going to attempt to locate and arrest Clarence Williams pursuant to a warrant.

Q. Was there any meeting that took place later that evening at 12th Street and Van Buren?

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. ~~1102~~ 81

CLARENCE WILLIAMS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CITATIONS

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

No.

CLARENCE WILLIAMS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

COMES NOW PHILIP M. HAGGERTY, attorney for the petitioner, and hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, entered on October 17, 1969.

OPINIONS BELOW

The opinion of the Court of Appeals is set forth in Appendix A pages 18 to 25, but is not yet reported.

JURISDICTION

The judgment of the panel of the Court of Appeals was entered on October 17, 1969. A petition for rehearing en banc was denied on December 24, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the opinion of this Court in *Chimel vs. California,* 395 U.S. 752, 89 S. Ct. 2034 should be applied retroactively to cases on appeal at the time of said decision but involving searches occurring prior to the date of said opinion.

2. Whether, assuming that *Chimel* does not apply in this case, the search was nevertheless void on the grounds that it was not properly incident to an arrest since the arrest was merely a pretext for conducting a general search of the premises in question without a search warrant.

3. Whether the facts before the jury were legally sufficient to show beyond a reasonable doubt that this petitioner had the requisite knowledge and control so as to constitute possession of the heroin as charged in the indictment.

STATEMENT

On March 31, 1967, at approximately 12:15 o'clock a.m., Federal, State and City narcotics Officers entered a private residence at 1402 East Granada, in the City of Phoenix, Arizona (Transcript of Trial Proceedings*page 12), allegedly for the purpose of arresting Petitioner CLARENCE WILLIAMS. Approximately nine officers were present (TTP 13;47). The stated purpose of the officers was to arrest Petitioner CLARENCE WILLIAMS for a crime he allegedly committed prior to March 31, 1967. The warrant of arrest was based on a sale of heroin alleged to have occurred March 9, 1967 (Transcript of Motion to Suppress**page 7).

The arrest warrant had been secured by Federal agent, Henry Watson, at approximately 4:30 o'clock p.m. on March 30, 1967. (TMS 23). No request or attempt was made by the arresting officers at that time or any other time to procure a warrant to search the premises at 1402 East Granada or any other premises.

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*hereinafter abbreviated as TTP

**hereinafter abbreviated as TMS

The stated reason for not obtaining a search warrant was that in the opinion of the arresting officers there was no probable cause for the issuance of such a warrant to search the premises at 1402 East Granada (TMS 101).

Federal agent Watson and other arresting officers met in the Federal Building in Phoenix at approximately 8:00 o'clock p.m. on March 30, 1967, ostensibly for the purpose of discussing and planning the execution of the arrest warrant on Petitioner CLARENCE WILLIAMS. (TTP 53; TMS 25-29; 90-91; 303). According to the testimony of one of the arresting officers at the hearing on the motion to suppress prior to trial, the specific search of the premises at 1402 East Granada was also discussed and planned at this meeting (TMS 281-282).

Upon the arresting officers arriving at the Granada premises after midnight on March 31, 1967, and identifying themselves, they were admitted into the living room of the house by Arlene Jackson (TTP 13; TMS 34-36), who was a defendant in the original trial but whose conviction was reversed by the Court of Appeals. Petitioner CLARENCE WILLIAMS was immediately placed under arrest (TMS 36-37). Simultaneously with the arrest of Petitioner CLARENCE WILLIAMS, eight or nine officers without the consent of Petitioner (TMS 49), without a search warrant (TTP 54; 74; TMS 49) and without inquiring as to the ownership of the premises (TMS 39-40), began a systematic general search of the premises (TMS 38) lasting approximately two hours (TMS 159).

In the course of this search, one of the officers discovered a metal container (Exhibit #1) on the upper closet shelf of the northeast bedroom (TTP 62; 76). In this container, a quantity of heroin (Exhibit #3) was found (TTP 114). Petitioner WILLIAMS and Mrs. Jackson were subsequently tried and convicted of possession of this heroin.

In the closet and dresser of this same bedroom, officers observed articles of male and female clothing (TTP 65). The

ownership of this clothing was never established (TTP 84-85)., though Petitioner CLARENCE WILLIAMS in getting dressed to go to the police station did take certain items of clothing from the closet and dresser (TT22; 33).

The Court of Appeals upheld the conviction of Petitioner WILLIAMS, finding that the *Chimel* rule did not apply to searches conducted before the date of the U.S. Supreme Court decision, that the search was valid under pre-Chimel standards and was not simply done under the pretext of an arrest, and that as to petitioner WILLIAMS, there was sufficient evidence of constructive possession of the heroin to find him guilty beyond a reasonable doubt. The Court disagreed with the jury's verdict in regard to defendant Jackson, however, on the ground of lack of sufficient evidence of constructive possession, and directed her acquittal. (Appendix A).

ARGUMENT

I. *The decision in Chimel should be applied retroactively at least to those persons whose convictions were on appeal at the time the rule was handed down.*

It is the contention of the petitioner herein that the decision of this court in *Chimel vs. California,* 395 U.S. 752, 89 S. Ct. 2034, should be applied retroactively to cover this Petitioner, whose case was on appeal at the time the *Chimel* decision was handed down. Although a plurality court in the recent case of *Desist vs. United States,* 394 U.S. 244, 89 S. Ct. 1030 appeared to hold the contrary, Petitioner asks a majority of the Court to reconsider the position of the four-member plurality at least in regard to cases on direct appeal as the instant case.

Of course the problem of retroactivity has been a troublesome one for the Court since it started enunciating new Constitutional rules applying to criminal prosecutions in 1962. Although several rules have been used by ths Court in determining retroactivity, the basic case appears to be *Linkletter vs. Walker,* 381 U.S. 618, 85 S. Ct. 1731. This case refused to apply the ruling on *Mapp vs.*

Ohio 367 U.S. 643, 81 S. Ct. 1684 retroactively to those whose convictions had become final at the time of the *Mapp* decision. However, the *Linkletter* decision did hold or at least imply that the *Mapp* ruling would be applied to cases still on appeal at the time it was handed down. The same holding was followed in the case of *Tehan vs. Shott,* 382 U.S. 406, 86 S. Ct. 459, which considered retroactivity of the U. S. Supreme Court decision in *Griffin vs. California,* 380 U.S. 609, 85 S .Ct. 1229. In the *Desist* case, Justice Harlan expressed a strong dissent, pointing out that this Court had always held that it would make decisions retroactive when they were clearly foreshadowed by prior case law. Justice Harlan held that at a minimum, all new rules of Constitutional law must be applied to all cases still subject to direct review by the Court at the time of the new decision. He pointed out that it was unfair and unjudicial for a Court to pick and choose among defendants as to who will get the benefit of a new rule of Constitutional law. He indicated that was especially true when the case involved a Federal conviction, as in the instant case with Petitioner WILLIAMS, rather than a rule imposed upon a defendant in a state court.

Even more cogent reasons for the retroactivity on direct appeal of *Chimel* were expressed by Justice Peters of the California Supreme Court in *People vs. Edwards,* 80 Cal. Rptr. 633, 458 P. 2d 713. Justice Peters, at Page 642 of 80 Cal. Rptr., says clearly that the *Chimel* rule should be retroactive to cases pending on direct appeal. He states:

> "In my view, the rule announced in *Chimel* applies to all pending cases. To hold that its rulings are purely prospective is an arrogant abuse of judicial power and a blatant exercise of legislative power. . . . ."

Justice Peters points out that most of the arguments used in opposition to retroactivity are really attacks on the whole concept of the exclusionary rule, such as the argument that it is too late to deter police misconduct and that the guilty will go free. He

states that the fundamental policies reflected by the *Mapp* ruling are frustrated by a prospective application rule. He states:

> "The immediate result of the refusal to apply *Chimel* to pending cases means that the Appellate and trial courts of this state will have a hand in the 'dirty business' of securing convictions by the use of unlawfully obtained evidence. In these days, when so many people have taken to the streets in attacks upon our institutions and in defiance of the fundamental concepts of ordered liberty, it is more than ever necessary that a Court out of regard to its own dignity as an agency of justice and custodian of liberty strive to maintain that dignity, vindicate Constitutional rights, and encourage respect for a system of justice which does not sacrifice Constitutional rights for expediency. Yet we are told today that a trial court may convict Mr. Edwards and others on the basis of evidence seized in violation of Constitutional rights and, if so, Appellate Courts may affirm that conviction. Such a system lends no dignity to our court system and does not encourage respect for our institutions or our law."

Justice Peters pointed out that although the main purpose of the exclusionary rule is to deter improper police conduct, a rule applying the *Chimel* concept to cases presently on appeal will encourage rather than discourage that goal. He pointed out that it is essential that the police learn as soon as possible exactly what the limits of the *Chimel* rule are and all of its ramifications so that they may properly govern their conduct accordingly. He pointed out that if courts will not even consider the *Chimel* rule on pending cases, but must wait until new cases climb up through the appellate process, it will take years for case law to come down construing the ramifications of *Chimel* and applying standards for the police to use. In the interim, the police will still have to take their chances on the proper interpretations and application of *Chimel* in cases not specifically covered by its exact holding, and the result may be to free additional criminals because of an illegal search when their post-*Chimel* searches finally come up for direct review a few years hence. Answering the argument

that applying *Chimel* retroactively would hinder the administration of justice, Peters commented:

"In any event, when the relatively few pending cases are weighed against the numerous searches which officers will conduct during the period when the Courts of this state refuse to consider the rules established by *Chimel*, it is apparent that the pending cases are merely the tip of the iceberg and furnish no justification to ignore its base. The business and sole justification for the Courts is declaring the law and determining controverses, and the possibility that the load of the Courts will be lightened does not warrant a refusal to declare or protect Constitutional rights. Such rights rest on no such uncertain grounds."

Justice Peters touches an another point referred to earlier by Justice Harlan, in regard to the fact that the *Chimel* rule had been foreshadowed by other cases. In other words, it is simply not true that police officers prior to *Chimel* had a full and complete right to rely upon the assumption that they could make any type of search that they wanted following an arrest without a search warrant. Justice Peters points out:

" . . . Both the majority and the dissent in *Chimel* recognize that the United States Supreme Court had taken vacillating and somewhat inconsistent positions as to the permissable scope of a search incident to an arrest. As the majority there pointed out, a search of an entire home as incident to an arrest therein is not 'supported by a reasoned view of the background and purpose of the Fourth Amendment' and that it would be 'possible' to distinguish such a search from prior cases by the Court. . . . . As recognized by *Chimel* and by *United States vs. Rabinowitz*, 339 U.S. 56, 70 S. Ct. 430, the main case overruled by *Chimel*, the reasonableness of searches depends on the facts and circumstances, and the Courts have not been consistent in determining what principles are to be applied in determining reasonableness. *Chimel* establishes that reasonableness is to be determined by viewing the facts and circumstances in the light of established Fourth Amendment principles. Certainly this is not new law."

Justice Peters notes that Supreme Court Justice White pointed

out in his dissenting opinion in *Chimel* that to go beyond the search of an arrested man and of the items within his immediate reach, there must be "probable cause to believe that seizable items are on the premises." As was pointed out in the statement of facts above, it is the contention of Petitioner herein that the weight of the factual evidence is that there was no probable cause to believe that there were drugs in the house of the Petitioner even apart from the fact that there was no warrant for the search of his house. Referring to the *Chimel* case itself, the majority opinion points out that numerous cases from the U. S. Supreme Court had shown that the right to search upon execution of an arrest warrant is not limitless. Among the cases cited for that view was *Trupiano vs. United States*, 334 U.S. 699, 68 S. Ct. 1229, *McDonald vs. United States*, 335 U.S. 451, 69 S. Ct. 191, *Agnello vs. United States*, 269 U.S. 20, 46 S. Ct. 4, *United States vs. Jeffers*, 342 U.S. 48, 72 S. Ct. 93, *Terry vs. Ohio* 392 U. S. 1, 88 S. Ct. 1868, *Preston vs. United States*, 376 U.S. 364, 84 S. Ct. 881, and *Sibron vs. New York*, 392 U.S. 40, 88 S. Ct. 1889. At footnote 15 on Page 2042 of the Supreme Court Reporter citation, the U.S. Supreme Court gives a long list of cases which it states shows that *Harris vs. U.S.*, 331 U.S. 145, 67 S. Ct. 1098, and *U.S. vs. Rabinowitz*, the cases overruled by Chimel, have been relied upon less and less in the court's own decision. See also *U.S. vs. Kirschenblatt*, 16 F. 2d 202 (Second Circuit.

In summary, therefore, Petitioner asks the Court to reconsider the plurality opinion of *Desist vs. United States*, supra, and to rule that the *Chimel* decision is applicable to cases on direct review such as the instant case. If *Chimel* is applicable, it is conceded by both the United States of America, through the U. S. Attorney in its supplemental brief, and by the Court of Appeals in its decision that *Chimel* would apply to the instant case and make the instant search invalid and unconstitutional.

II. *The arrest of the Petitioner was a mere pretext to carry out a general and exploratory search incidental to the arrest.*

The arresting officers in this case based the search of the premises where the arrest was made on the fact that it was made incidental to a lawful arrest (TMS 38). Even if the arrest warrant was valid, nevertheless the Petitioner contends that the search itself was a primary motive for the officers being at the Granada premises at that time, and therefore even if *Chimel* does not apply, the search was not reasonably incident to a lawful arrest and is therefore invalid. The arresting officers, knowing that they did not have probable cause to obtain a search warrant (TMS 101) used the arrest as a vehicle to circumvent the requirements of obtaining a search warrant. Thus the Petitioner submits that the search was not incidental to the arrest but that rather the arrest was incidental to the search.

On March 9, 1967, some three weeks before the arrest and search in question, Petitioner CLARENCE WILLIAMS is alleged to have sold heroin to a Federal narcotics agent (TMS 7). In the interim between March 9, and March 30, 1967, Petitioner was kept under surveillance as was the Granada residence (TMS 12-18; 81-83). There is no evidence that known narcotics dealers or users were observed going to or from the home during this period (TTP 41).

About four hours after the issuance of the arrest warrant for the Petitioner, a meeting of Federal, State and City officers was called at the Federal Building in Phoenix, in connection with the issuance of the arrest warrant. Approximately a dozen officers attended that meeting, (TTP 53; TMS 25-29; 243). Although the ostensible reason for the meeting was to plan the execution of the arrest warrant that night, Petitioner alleges that in fact the primary purpose behind the meeting was the specific planning of the general exploratory search of the Granada premises. Robert Gutierrez, a City of Phoenix police officer, who was present at said meeting and also participated in the search at the place where Petitioner was arrested, testified that he was instructed at the meeting to assist Federal, State and City officials in carrying out a search of the Granada premises (TMS 281-282).

In *United States vs. James,* 378 Fed. 2d 88 (6th Cir. 1967), approximately ten officers met at police headquarters before going to the appellant James' residence to serve an arrest warrant for a narcotics violation. The officers were assigned specific areas of the residence to search. After the arrest, a vacuum cleaner containing narcotics was found in a bedroom closet. The 6th Circuit Court in reversing appellant James' conviction for possession of narcotics and in agreeing with the appellant's contention that her arrest was a mere pretext to make the search, said:

> "Taking into account all of the admitted facts and circumstances of the case, including the large aggregation of agents and police officers, it seems to us that the agents and officers were interested in something more than merely making an arrest. It is clear that their primary purpose was to make a general exploratory search of the apartment with the hope of finding narcotics. This search in our judgment was unreasonable and violated the rights of Appellant James under the Fourth Amendment to the Constitution. *United States vs. Harris,* 321 F. 2d 739 (6th Cir. 1963)." (Pp. 90-91.)

In *Amador-Gonzales vs. United States,* 391 F. 2d 308 (5th Circ. 1968), the Appellate Court, in declaring a search incidental to a lawful arrest for a traffic violation to be illegal, said:

> "The rationale for the search incident to arrest exception is the historical right of an arresting officer to search the place of arrest and the practical consideration that once an arrestee's privacy is invaded by his being placed in lawful custody, there is little or no additional invasion in searching him or the immediate surroundings which the police have entered to effect the arrest. Again, however, fidelity to the Fourth Amendment commands that the exception not engulf the rule. The lawfulness of an arrest does not always legitimate a search. General or exploratory searches are condemned even when they are incident to a lawful arrest. *United States vs. Rabinowitz,* 339 U.S. 62, . . . The arrest must not be a mere pretext for an otherwise illegitimate search. *Henderson vs. United States,* 4 Cir. 1926, 12 F. 2d 258, . . . ; *Worthington vs. United States,* 6 Cir. 1948, 166 F. 2d 557; *McKnight vs. United States,* . . . . 183 F. 2d 977; *United States vs. Harris,* 6 Cir. 1963, 321 F. 2d

739; *Taglavore vs. United States,* 9 Cir. 1961, 291 F. 2d 262." (Page 313).

In the *James* case supra, the arresting officers had information that appellant James had used the searched residence as a place of business for the distribution of narcotics up to the date of the arrest.

As set forth above, in the instant case there was no showing whatever of any connection between the Granada premises and the crime of the sale of heroin for which the arrest warrant was issued. Therefore, the appellant contends that the absence of any probable cause for a search warrant concerning the Granada premises makes the use of an arrest warrant as a means to conduct a search incidental to an arrest even more of an unwarranted pretext than it was in the *James* case, supra.

It is further submitted that the companion cases to *Chimel, Von Cleef vs. New Jersey,* 395 U.S. 814, 89 S. Ct. 2051, and *Shipley vs. California,* 395 U.S. 818, 89 S. Ct. 2053, indicate that this search was not lawful even under pre-*Chimel* standards. These companion cases which did not apply *Chimel* applied the old rules of *U.S. vs. Rabinowitz,* 339 U.S. 56, 70 S. Ct. 430 and *Harris vs. United States,* 331 U.S. 145, 67 S. Ct. 1098.

In *Rabinowitz,* the place of search was a business room to which the public was invited. The room was small and under the immediate and complete control of the one arrested. In the instant case the place searched was a private residence. The article in question was seized from a bedroom shelf after the defendants were arrested in another room of the residence. And of crucial importance, the record shows that the arresting officers had made no determination before the search of the ownership of the residence, nor of the ownership of clothing found in the same bedroom.

In *Harris,* the one arrested was in exclusive possession of a four-room apartment. Moreover, the police there, after making the arrest, were specifically looking for two cancelled checks

which were thought to be the means and instrumentality used in the crime for which the petitioner there was arrested.

In the instant case, again, the arresting officers did not and could not establish that the defendants were in exclusive possession of the rooms searched. And unlike *Harris,* the police in the instant case already had in their hands the means used in the crime charged, namely, a quantity of narcotics from a previous sale.

The court in *Harris* stated: "Nor is this a case in which law enforcement officers have entered premises ostensibly for the purpose of making an arrest but in reality for the purpose of conducting a general exploratory search for merely evidentiary materials tending to connect the accused with some crime." (331 U.S. at p. 153; 67 S. Ct. at p. 1102).

In the instant case, the Petitioner contends that the arresting officers did discuss the search of the residence in question *before* the search. The use of eight or nine officers in the arrest tends to confirm a real purpose of making a general exploratory search.

Mr. Justice Frankfurter, in his dissenting opinion in *Harris,* said: ". . . . There was no search warrant, no crime was 'openly being committed' in the presence of officers; the seized documents were not 'in plain view' or 'picked up by the officers as an incident of the arrest.' Here a 'thorough search' was made and made without a warrant." (331 U.S. at p. 169; 67 S. Ct. at p. 1110).

None of the circumstances found lacking in *Harris* by Mr. Justice Frankfurter are present in the instant case.

In *Shipley,* supra, the police arrested the petitioner outside his house and then searched the house. The fact situation, therefore, can be distinguished from that of the instant case, where the appellants were arrested inside a private residence.

But the Supreme Court pointed out in *Chimel,* supra, (to be discussed further below), that had the petitioner there been arrested earlier in the day at his place of business, no search could have been made in his house without a search warrant.

In *Chimel,* supra, the police searched the petitioner's three-bedroom house pursuant to an arrest warrant after the petitioner was arrested inside the house. Thus, the fact situation is very close, if not congruent, with that of the instant case.

The Court, in *Chimel,* held the search of the whole house unlawful. The Court said:

> "There is ample justification, therefore, for search of arrestee's person and area 'within his immediate control' construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence. There is no justification, however, for routinely searching rooms other than that in which an arrest occurs or, for that matter, for searching throughout all desk drawers or other closed or concealed areas in that room itself." (89 S. Ct. at p. 2040).

Thus, if the rule announced in *Chimel* is applicable in the instant case, then the search of the bedroom was unlawful and the evidence seized therein should be suppressed. The Court in *Chimel,* however, did not decide the question of retroactive application of the new rule, though Mr. Justice Harlan in his concurring opinion in *Von Cleef,* supra, reaffirmed his view that any "new" rule should apply in all cases still subject to direct review by the Supreme Court.

Even without retroactive application of *Chimel,* however, the Petitioner contends that the search in question violated the limiting standards of pre-*Chimel* law. Not only did the search in the instant case go beyond *Rabinowitz* and *Harris,* as argued above, but the Court in *Chimel* pointed out that *Rabinowitz* and *Harris* have been relied upon less and less in the Court's decisions.

Furthermore, in *Chimel,* the Court referred to its previous decision in *Sibron vs. New York,* 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968). In *Sibron,* a policeman had put his hand in the suspect's pocket for the purpose of finding narcotics. The Court held that search to be unlawful where it was made for a purpose other than protection of the police officer. The Petitioner contends that the search in the instant case was mani-

festly for a purpose other than protection of the arresting officers.

III. *The government failed to prove knowledge and control sufficient to constitute possession.*

Petitioner was convicted of unlawful concealment of a narcotic drug. Since the government could not show and did not even claim the actual possession of the heroin by this Petitioner, the government had the burden of proving beyond a reasonable doubt that Petitioner had sufficient knowledge and control of the heroin as to constitute constructive possesion.

The only evidence on this point included the facts that Petitioner had been observed entering and leaving the Granada premises (TTP 14, 15, 40, 59), that he had been observed in a vehicle at the premises on a number of occasions (TTP 14, 68), that he was on the premises the night of the arrest, that he was in a state of semi-undress while eating supper and watching TV immediately prior to the arrest (TTP 13; 69), that articles of male and female clothing were observed in the closet and dresser in the bedroom in which the heroin was found (TTP 65; 84-85), and that before being taken to jail, Petitioner put on clothing which he obtained from the same closet in which the heroin was found (TTP 22; 33).

The problem is that there were at least two persons occupying the home at the time of the arrest, being the Petitioner and his co-Defendant, Arlene Jackson, who was ordered acquitted by the Court of Appeals due to lack of sufficient evidence of constructive possession. Petitioner points out that no inquiry was made by the arresting officers prior to or at the time of the arrest and search to determine who had ownership or control of the Granada premises. In addition, no attempt was made to obtain fingerprints from the metal container in which the heroin was found (TTP 31; 56; 117-118), and no attempt was made to determine the ownership of the clothing observed in the bedroom in which the heroin was found (TTP 85).

In *Delgado vs. United States*, 327 F. 2d 641 (9th Cir. 1964),

wherein the fact situation was compellingly similar to the fact situation in the instant case, the 9th Circuit Court reversed the conviction of the appellants for receiving and concealing narcotics. There the appellants lived together as common law spouses in the same house. The police found marijuana cigarettes in the night table of the appellants' bedroom. One of the appellants admitted to ownership of two purses found in the bedroom. In reversing the convictions, the Court said:

> "It is fundamental to our system of criminal law that guilt is individual. Here that means that there must be sufficient evidence to support a finding, as to each defendant, that he or she had possession of the marijuana. Posession can be joint as well as several, "constructive" as well as "actual." It must also be knowing. But here it is pure speculation as to whether Rodriguez alone, or Delgado alone, or both of them, had possession. No doubt one of them did; perhaps both did. But proof that does not give a rational basis for resolving the doubts necessarily present in the situation pictured to the jury in this case is not sufficient." (Page 642)

More recently, the 9th Circuit Court in *Cass vs. United States,* 361 F. 2d 409 (9th Cir. 1966), followed the *Delgado* decision, supra, and used it as the basis for reversing the conviction of the appellant on two counts of unlawful concealment of narcotic drugs. In *Cass,* the arresting officers possessing a search warrant entered the appellant's residence. The officers first observed the appellant in the living room. The officers then entered the kitchen where they observed one Ann Smith seated at a kitchen table, her hands on the table in close proximity to an ash tray which contained one marijuana cigarette. A plastic shampoo bottle containing some six grams of marijuana was on the table opposite to where Ann Smith was sitting. The Court there said: "In *Delgado* there was the near certainty expresed by the Court that one or the other of the two persons in the room possessed the narcotics, and the possibility that both possessed them. But that did not justify the jury in covering this uncertainty by finding both occupants possessed them." (Page 411).

Moreover, the Court in *Cass* thought that in view of the small quantity of narcotics involved, the idea of the narcotics being jointly owned and possessed "borders on the absurd." (Page 412).

Petitioner claims herein, that as stated in the *Delgado* case, supra, it simply could not be determined on the present state of the record whether Petitioner WILLIAMS, former co-Defendant Jackson, or both, had possession of the heroin in question — at least not beyond a reasonable doubt. A holding that this Petitioner had possession, is not only merely speculative possession, but is inconsistent with the ruling of the Court of Appeals acquitting former co-defendant Jackson, since there is not sufficient additional evidence connecting this Petitioner to the heroin in question. Since there were articles of female clothing in the closet, it is quite possible that the closet where the heroin was found was used primarily by said co-defendant Jackson. There is no evidence whatsoever of knowledge by Petitioner WILLIAMS that the heroin was in the closet, since it has not been shown when the heroin was put there or how often Petitioner WILLIAMS had occasion to look into the closet.

CONCLUSION

For the reasons stated above, the petition for the writ of certiorari should be granted so that this Court can consider the important questions involving the retroactivity of the *Chimel* rule, the extent of the rule in regard to searches without a warrant pursuant to a valid arrest if *Chimel* does not apply, and the question of whether sufficient constructive possession was shown to convict the Petitioner.

Respectfully submitted,

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APPENDIX "A"

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLARENCE WILLIAMS and ARLENE JACKSON, *Appellants,* v. UNITED STATES OF AMERICA, *Appellee.*	Nos. 22871 22870

Appeal from the United States District Court for the District of Arizona

Before: BROWNING, CARTER, and HUFSTEDLER, Circuit Judges

HUFSTEDLER, Circuit Judge:

Williams and Jackson were jointly tried and each was convicted for concealing illegally imported heroin in violation of 21 U.S.C. § 174.[1] Both of them appeal, raising the issues: (1) Did the District Court err in denying their motions to suppress the heroin as the product of an illegal search? (2) Did the District Court err in denying their motions for acquittal based upon the

[1] 21 U.S.C. § 174 provides in pertinent part: "Whoever . . . conceals . . . any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, . . . shall be imprisoned not less than five or more than twenty years . . . .

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

insufficiency of the evidence to sustain the jury's implied finding of possession?

We hold: (1) The search was not illegal because Williams' arrest was not as a matter of law a pretext for the warrantless search and because the rule of *Chimel v. California* (1969) 395 U.S. 752 does not apply to searches conducted before June 23, 1969, the date of the *Chimel* decision; (2) the evidence was insufficient to support Jackson's conviction; and (3) the evidence was sufficient to support Williams' conviction.

Legality of the Search

Jackson and Williams contend that the heroin was the product of an illegal search because Williams' arrest was a pretext for a warrantless search of the Granada Street residence in which he was arrested and because the scope of the search went beyond that properly incident to the arrest.

The Government had probable cause to believe that Williams was a party to a sale of heroin on March 9, 1967. He was not then arrested, but he was kept under surveillance by federal and state law enforcement officers to try to find out the source of the narcotics. On March 30, 1967, federal narcotics agent Watson obtained a warrant for Williams' arrest for the sale on March 9. Federal, state, and city officers met at the Federal Building in Phoenix, Arizona, about 8:00 p.m. on March 30 for the purpose of planning the execution of the arrest warrant. There is a conflict in the evidence as to whether a search of the Granada Street residence was discussed at that meeting. Police Officer Gutierrez testified that the residence search was discussed and planned. Other law enforcement officers testified that there was no discussion about searching the Granada Street residence.

After the meeting, the officers circulated in various locations known to be frequented by Williams. During the period from 5:50 p.m. to 11:40 p.m. defendant Williams was constantly on the move. It was not until he returned to the Granada residence shortly before midnight that the officers located him. Shortly

after midnight eight officers entered the residence to arrest Williams. Williams was discovered in the living room. The search began almost immediately and lasted for about one hour and forty-five minutes. Federal agent Watson testified that they were looking for contraband, in particular, narcotics, and for Government money which had been used to purchase narcotics.

Defendant Williams contends that this evidence shows that "the arresting officers, knowing they did not have probable cause to obtain a search warrant [for the Granada residence], used the arrest as a vehicle to circumvent the requirements of obtaining a search warrant." The Government agrees that an arrest may not be used as a pretext to search for evidence without a search warrant where one would ordinarily be required under the Fourth Amendment.

Whether or not an arrest is a mere pretext to search is a question of the motivation or primary purpose of the arresting officer. Improper motivation has been found where the arrest is for a minor offense which serves as a mere "sham" or "front" for a search for evidence of another unrelated offense for which there is no probable cause to arrest or search. (*See Amador-Gonzalez v. United States* (5th Cir. 1968) 391 F.2d 308; *Taglavore v. United States* (9th Cir. 1961) 291 F.2d 262.) It has also been found where the arresting officer deliberately delays making the arrest in order to allow the arrestee to enter the premises which the officer desires to search. (*Compare McKnight v. United States* (D.C. Cir. 1950) 183 F.2d 977 *with United States v. Weaver* (4th Cir. 1967) 384 F.2d 879, *cert. denied* (1968) 390 U.S. 983.)

There is ample evidence to sustain the District Court's finding that the arrest was not a pretext for the search. The search for contraband was related to the nature and purpose of the arrest. The delay in obtaining the arrest warrant was justified by the quest for more evidence and by the investigation to ascertain the source of the narcotics. The officers proceeded with due dili-

gence to execute the warrant after it was issued by serving Williams wherever he could be found. There is no evidence that the officers deliberately passed up an earlier opportunity to arrest Williams on the warrant. We cannot hold as a matter of law on this record that the primary purpose of executing the warrant upon Williams when he returned to the Granada residence was to search that house. (*Compare United States v. Costello* (2d Cir. 1967) 381 F.2d 698 *with United States v. James* (6th Cir. 1967) 378 F.2d 88.)

Williams was arrested in the living room of the Granada residence. Following his arrest, the officers searched the whole house. The heroin was found in a container on a closet shelf in the northeast bedroom. *Chimel v. California, supra,* held that a search of the house in which a defendant is arrested is no longer within the bounds of a search incident to an arrest and that the constitutional perimeter of such a search is the person of the arrestee and the area "within his immediate control." (395 U.S. at 763.) The Williams search is illegal under the *Chimel* standard, and the heroin should have been excluded from the evidence if the *Chimel* rule applies retroactively to searches conducted before June 23, 1969.

The Supreme Court has expressly left open the question of *Chimel's* retroactivity. (*Shipley v. California* (1969) 395 U.S. 818; *see also Von Cleef v. New Jersey* (1969) 395 U.S. 814.) However, in *Desist v. United States* (1969) 394 U.S. 244, the Court reiterated the guidelines for determining retroactivity of a new constitutional rule first stated in *Linkletter v. Walker* (1965) 381 U.S. 618:

> "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." (394 U.S. at 249.)

The Court in *Desist* said the foremost of the three criteria was

the first. If the purpose is to deter misconduct of police officers in conducting a search, the new exclusionary rule will not be given retrospective effect because that purpose is not advanced by penalizing conduct that has already occurred. The exclusionary rule in such cases, the Court observed, was a procedural device to curb illegal police action and not a rule affecting the integrity of the process for finding the innocence or guilt of an accused.

We are unable to see any meaningful difference between the purpose or the effect of the exclusionary rule announced in *Katz v. United States* (1967) 389 U.S. 347, affecting the admissibility of evidence obtained by electronic eavesdropping, and the exclusionary rule announced in *Chimel*, affecting the admissibility of evidence obtained by a search not reasonably incident to an arrest. We conclude, therefore, that the rule of retroactivity stated in *Desist* with respect to *Katz* applies in full measure to *Chimel*. Accordingly, we hold that the rule of *Chimel* applies only to those searches claimed incident to an arrest, conducted after June 23, 1969.[2]

The legality of the search incident to Williams' arrest is controlled by the pre-*Chimel* standards stated in *United States v. Rabinowitz* (1950) 339 U.S. 56 and *Harris v. United States* (1947) 331 U.S. 145: Was the search reasonable under the totality of the circumstances? We think it was. The arrest was for the sale of heroin, and the object of the search was the discovery of the contraband and of the Government money used to purchase heroin. As in *Harris*, the nature of the fruits of the crime makes it likely that "they would have been kept in some secluded spot." The search covered the house in which Williams was found and in which he gave every appearance of residing. The

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[2] The same result has been reached by the Fifth Circuit in Lyon v. United States (1969) F.2d [No. 26190, Sept. 4, 1969], the Second Circuit in United States v. Bennett (1969) F.2d [No. 32327, Sept. 9, 1969], and by the California Supreme Court in People v. Edwards (1969) Cal. 2d [No. 12872, Sept. 23, 1969].

search was not of an area m ore extensive than that permitted in *Harris*.

Sufficiency of the Evidence

The Government's case a ainst both Jackson and Williams rested exclusively upon the pr sumption from proof of possession stated in section 174. It was th refore incumbent upon the Govern- ment to prove beyond a rea onable doubt that each defendant possessed the heroin.

The Government had to rove that each defendant was in constructive possession of th heroin, because neither defendant had actual possession of the n rcotic. One has constructive posses- sion of contraband if he kn ws of its presence and has power to exercise dominion and c trol over it. (*Figueroa v. United States* 9th Cir. 1965) 352 F 2d 587; *Arellanes v. United States* (9th Cir. 1962) 302 F.2d 03, *cert denied* (1962) 371 U.S. 930; *Hernandez v. United tates* (9th Cir. 1962) 300 F.2d 114.)

Here is the evidence beari g upon the possession issue: When the federal narcotics agents pped on the door of the Granada residence shortly after mid ht on March 31, 1967, Jackson answered the door and admit d the officers. She was fully clothed. The agents walked into the living room and placed Williams under arrest. He was sitting n a sofa in the living room eating a meal from a tray and w ching television. He was wearing underwear, a robe, and slipp rs. After his arrest, Williams went to the northeast bedroom d dressed himself in clothing he took from the closet and e dresser in that room. Both the closet and dresser containe men's and women's apparel. The heroin was later discovered the shelf of the closet from which Williams took some of his othes.

Before the night of Wil ums' arrest, the Granada house had been placed under surveill entering or leaving the hou e. Jackson had been seen either was no evidence that the we on four or five occasions. There men's apparel in the northeast bed-

room was hers. There was no evidence that she owned or rented the house, or that Williams did so. Jackson's relationship, if any, to Williams was not proved.

To sustain the jury's finding of Jackson's guilt, we would have to decide that from the facts that she was in the house after midnight, that she had been seen entering and leaving the house on several prior occasions, and that there was feminine apparel in the northeast bedroom, the jury could reasonably have concluded that she was living in the house and sharing Williams' bedroom, that she had at least joint power to control the closet and its contents, and that she knew the heroin was there. Further, we would have to be satisfied that the jury could have reached those conclusions free from any reasonable doubt, *i.e.*, that kind of doubt " 'that would make a person hesitate to act' in the more serious and important affairs of his own life." (*United States v. Nelson* (9th Cir. 1969) F.2d , quoting in part, from *Holland v. United States* (1954) 348 U.S. 121, 140.) The evidence against Jackson does not rise to that standard, and the case against her collapses.

The evidence of Williams' possession is very different from that of Jackson's. Williams was obviously at home in the Granada residence. He used clothes from the closet in which the heroin was found. He could have reached for the heroin as easily as he reached for his coat. The only ingredient of constructive possession which had to be proved circumstantially was his knowledge of the presence of the heroin. The jury could properly conclude that it was more probable than not that he had the requisite knowledge. From the presence of feminine apparel in the same closet, an inference can be drawn that a woman had access to the closet. But that inference does not contradict the inference that Williams knew that the heroin was in his closet and we cannot say that the inference is so strong as to raise a reasonable doubt that Williams did not know the contraband was there.

The judgment against Jackson is reversed. The judgment against Williams is affirmed.

APPENDIX "B"

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLARENCE WILLIAMS,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 22871
ORDER

Before: BROWNING, CARTER, and HUFSTEDLER, Circuit Judges

Appellant-petitioner is remitted to his remedy under 28 U.S.C. § 2255 to pursue his claim that the testimony of one of the Government's witnesses was perjured.

The petition for rehearing is denied.

/s/ SHIRLEY HUFSTEDLER
Shirley Hufstedler, Circuit Judge

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1125

CLARENCE WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 418 F.2d 159. The judgment of the court of appeals was entered on October 17, 1969. A petition for rehearing en banc was denied on December 24, 1969. The petition for a writ of certiorari was filed on January 26, 1970 and is thus out of time under Rule 22-2 of this Court.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to establish petitioner's possession of the narcotics.

2. Whether the search was reasonably incident to the lawful arrest under the standards which governed prior to the decision in *Chimel* v. *California*, 395 U.S. 752.

3. Whether the new rule announced in *Chimel* should be retroactively applied to cases pending on appeal at the time it was decided.

STATEMENT

After a jury trial in the United States District Court for the District of Arizona petitioner was convicted of concealing illegally imported heroin in violation of 21 U.S.C. 174 (IR 1, 61; TTP 188, 200).[1] On February 26, 1968 he was sentenced to imprisonment for ten years (IR 68). On appeal his conviction was affirmed (Pet. App. A).[2]

The evidence, adduced on the motion to suppress (which was denied (TMS 313)) and at the trial showed the following: The government had reasonable grounds to believe that petitioner had been a

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[1] For the sake of uniformity, we use the same abbreviations designated by petitioner in his petition, *i.e.*, "TTP" for the transcript of the trial proceedings, and "TMS" for the transcript of the motion to suppress. We are lodging with the Clerk copies of these two transcripts.

[2] The court below found the evidence of possession insufficient as to codefendent Arlene Jackson, who was tried jointly with petitioner, and reversed her conviction (Pet. App. A).

party to an illegal narcotics sale on March 9, 1967 (IR 6-15, 21; TMS 7-8, 51-53, 69). Federal, state and city police officers of Phoenix, Arizona, continued to investigate petitioner and codefendant Jackson after March 9 to determine the source of the supply of the narcotics (TMS 12, 13, 16, 17, 19, 20, 253). A check of the local utility company's records showed that petitioner and Mrs. Jackson lived at 1402 East Granada in Phoenix (TMS 40). On occasions law officers had observed petitioner park a 1959 Chevrolet and a 1967 Cadillac in front of this residence, and had seen petitioner and Mrs. Jackson enter and leave (TTP 14-15, 67-68, 82). One officer testified that he had observed the East Granada premises for several weeks prior to March 31, 1967, and had not seen anyone other than petitioner or Mrs. Jackson entering or leaving the premises (TTP 41).

At 4:30 p. m. on March 30, after the officers had concluded that further investigation as to the source of supply would no longer be fruitful, they obtained a warrant for petitioner's arrest for the illegal sale of heroin that had occurred on March 9 (TMS 21, 24). At 8:00 p. m. that evening, federal, state and local officers had a meeting, at which they were instructed to go to different locations to find petitioner, and to arrest him pursuant to the warrant (TMS 28, 84, 135, 141, 201-202, 244-245, 303). No search warrant had been issued for the East Granada premises (TMS 49, 101, 214, 254). Four officers testified that at the meeting there was no discussion about plans to search the East Granada premises as incident to petitioner's arrest (TMS 29, 91, 203-204,

248-249). Officer Gutierrez testified that at the meeting a search of these premises pursuant to a search warrant was discussed (TMS 281-282).

Starting at about 9:00 p. m. (TMS 29-30, 92, 187), the officers went to various locations known to be frequented by petitioner, including his home on East Granada and his business address in downtown Phoenix (TMS 30, 32-33, 92-94, 245-247). While the officers were looking for petitioner, according to his own testimony, from 5:50 p. m. when he left his East Granada residence until his return at 11:40 p. m., he was constantly on the move, going to his business address, various cocktail lounges and to a dog track (TMS 287-290, 293, 295-297). When petitioner drove up to his home in his Cadillac, it was the first time that day that the officers had seen him (TMS 23, 67, 136, 184, 221, 256). Agent Watson notified the other officers by police radio that petitioner had arrived home and the officers met at the East Granada address (TMS 59, 94).

At 12:10 a. m., agent Watson knocked on the front door, stated that he was a federal narcotics agent, and that he had a warrant for petitioner's arrest (TMS 34-35). After Mrs. Jackson opened the door, Watson entered and arrested petitioner in the living room (TMS 36). In the meantime other officers entered the home through various entrances (TMS 37, 59). Petitioner and Mrs. Jackson were the only persons on the premises other than the officers (TTP 13).

When agent Watson arrested petitioner, the latter was sitting on a sofa in the living room, eating a

meal and watching television. He was dressed in his underwear and a robe, and wore slippers (TTP 12-13, 69). For approximately two hours following the arrest, the officers conducted a search for heroin and other evidence of the crime (TMS 38, 105-106, 192, 196, 214-215, 252-253, 255; TTP 21). The search resulted in the seizure of cocaine, marihuana, $500 in government funds which had been used to purchase narcotics, and several loaded revolvers and rifles (TMS 45-46, 158). On a shelf in the closet in the northeast bedroom the officers seized a metal container, which had in it five rubber containers of heroin. (TTP 62-63, 76, 114).[3] This was the only closet in the bedroom; it also contained men's and women's clothing, one or two purses, men's hats and numerous shoes (TTP 65, 76). The room contained a double bed and a dresser in which there were men's and women's underclothing, some jewelry and socks (TTP 22-23, 65). Before leaving with the arresting officers, petitioner dressed in this bedroom, taking clothing from the dresser and closet (TTP 21, 22, 33, 69).

ARGUMENT

As noted the petition is out of time.

1. The holding that petitioner had possession of the narcotics is amply supported by the record. The totality of the circumstances showed that petitioner had possession and control of the East Granada

[3] 124.950 grams of this heroin was introduced at the trial as Government Exhibit 1, (TTP 15, 23, 70, 113-114).

residence; that when he left with the arresting officers he wore his own clothing taken from the closet and dresser of the northeast bedroom; that the heroin was found on the shelf of the same closet from which he took some of his clothes; that he "could have reached for the heroin as easily as he reached for his coat," as the court below observed (Pet. App. 24); and that accordingly, the jury could reasonably infer that petitioner had dominion and control over the metal container in which the heroin was found, even though no evidence was presented to show that the container bore his fingerprints. See *Hernandez* v. *United States*, 300 F.2d 114 (C.A. 9); *Evans* v. *United States*, 257 F.2d 121, 128 (C.A. 9), certiorari denied, 358 U.S. 866. *Delgado* v. *United States*, 327 F.2d 641 (C.A. 9) (Pet. 14-15) is distinguishable. In that case there was no evidence showing that the codefendants had exclusive possession of the premises, and no evidence to link either of them with the night stand in which the marihuana was found.[4]

2. The search was a reasonable incident to the arrest under the law as it existed prior to this Court's decision in *Chimel* v. *California*, 395 U.S. 752. It was directed at the fruits and evidence of the criminal behavior for which petitioner had been arrested (see *Warden* v. *Hayden*, 387 U.S. 294, 307), and as

[4] The holding of the court of appeals that defendant Jackson was not shown to have sufficient possession of the narcotics was based on a discriminating analysis of *her* relationship to the premises. It is in no way inconsistent with the finding that petitioner had possession, since petitioner's relationship to the premises and to the area in which the narcotics were found was much more significant (see Pet. 23-24).

the court below concluded, "was not of an area more extensive than that permitted" in *Harris* v. *United States*, 331 U.S. 145 (Pet. App. A 23).[5]

Nor was the arrest a pretext to conduct the search. The three week delay between the March 9 transaction and the procurement of the warrant was legitimate and reasonable investigative procedure aimed at discovery of the source of the heroin. "There is no constitutional right to be arrested", *Hoffa* v. *United States*, 385 U.S. 293, 310. Once the warrant was issued the officers did not avoid arresting petitioner at any place but his residence. On the contrary, they made a determined effort to locate him at numerous places other than his home. Their lack of success in this regard was not the product of a calculated plan,[6] but was simply due to the fact that petitioner—as he himself testified—was constantly on the move on the night of the arrest. (See TMS

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[5] Petitioner cannot fairly rely (Pet. 11) upon *Von Cleef* v. *New Jersey*, 395 U.S. 814, or *Shipley* v. *California*, 395 U.S. 818. In *Von Cleef*, the officers searched "a three-story, 16-room house from top to bottom" and seized thousands of items. (395 U.S. at 816). In *Shipley*, the search of the house was sought to be justified on an arrest in the street some 15 or 20 feet from the house (395 U.S. at 819). In neither case, this Court held, was the search a reasonable incident to the arrest under pre-*Chimel* law.

[6] The district court had ample basis to conclude that no plan to search the residence was discussed at the meeting held immediately before the officers began their search for petitioner. Four officers in attendance at this meeting testified that no such plans were discussed (see TMS 29, 91, 203-204, 248-249); and the only officer who testified to the contrary was of the erroneous view that the officers were proceeding under a search warrant (TMS 281-282).

287-290, 293, 295-297). The officers exercised due diligence to achieve the execution of the warrant. Their conduct should not be suspect because they were able to locate petitioner only at his home. See *United States* v. *Weaver*, 384 F.2d 879 (C.A. 4), certiorari denied, 390 U.S. 983.[7]

3. The court of appeals rejected the contention that the narrower search rule adopted in *Chimel* v. *California*, 395 U.S. 752, should be applied to this case, which was pending on appeal when *Chimel* was decided. It reasoned that since this Court in *Desist* v. *United States*, 394 U.S. 244, had held *Katz* v. *United States*, 389 U.S. 347, prospective only, the same rationale would govern to render *Chimel* prospective in application (Pet. App. 21-22). Other courts of appeals have come to the same conclusion. See, *e.g.*, *United States* v. *Bennett*, 415 F.2d 1113 (C.A. 2); *Lyon* v. *United States*, 416 F.2d 91 (C.A. 5), certiorari denied, January 12, 1970 (No. 1072 Misc., this Term); see also, *United States* v. *Edelman*, 414 F.2d 539 (C.A. 2), certiorari denied, January 26, 1970 (No. 798, this Term). It is our submission that this is the correct view. Nevertheless, this Court has recently granted a petition for certiorari in *Elkanich* v. *United States*, No. 1142, this Term, certiorari granted, February 2, 1970, which involves, as one of its issues, the applicability of

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[7] *United States* v. *James*, 378 F.2d 88 (C.A. 6) (Pet. 10) is inapposite since there the officers met shortly prior to the arrest to plan petitioner's arrest at her apartment, made no attempt to execute the warrant elsewhere, and "descended en masse upon the apartment" (378 F.2d at 90).

Chimel to a case which was final at the time *Chimel* was decided and in which relief is sought under 28 U.S.C. 2255. Therefore, should the Court deem it appropriate to waive its time requirements, it may wish to defer consideration of the instant case until after it decides *Elkanich*.

CONCLUSION

The petition for a writ of certiorari should be denied unless the Court deems it appropriate to defer passing on the instant petition until after it decides *Elkanich* v. *United States*, No. 1142, this Term.

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FEBRUARY 1970

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. ~~1125~~ 81

CLARENCE WILLIAMS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1125

CLARENCE WILLIAMS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is set forth in Appendix A, Pages 22 to 28, reported in 418 F.2d 159.

JURISDICTION

The judgment of the panel of the Court of Appeals, affirming the conviction of Petitioner CLARENCE WILLIAMS, was entered on October 17, 1969. The petition for rehearing enbanc was denied on December 24, 1969. A petition for writ of certiorari was filed on January 26, 1970, and was granted by this Court on March 23, 1970. Jurisdiction of this Court lies under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in the persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

QUESTIONS PRESENTED

1. Whether *Chimel vs. California,* 395 U.S. 752, should be applied retroactively, at least on direct review of a Federal criminal conviction not yet final at the time the *Chimel* decision was handed down.

2. Whether, assuming that *Chimel* does not apply in this case, the search was nevertheless void on the grounds that it was not properly incident to an arrest since the arrest was a mere pretext to carry out a general and exploratory search incidental to the arrest.

STATEMENT

On March 31, 1967, at approximately 12:15 o'clock a.m., Federal, State and City narcotics Officers entered a private residence at 1402 East Granada, in the City of Phoenix, Arizona (Transcript of Trial Proceedings* page 12), allegedly for the purpose of arresting Petitioner CLARENCE WILLIAMS. Approximately nine officers were present (TTP 13;47). The stated purpose of the officers was to arrest Petitioner CLARENCE WILLIAMS for a crime he allegedly committed prior to March 31, 1967. The warrant of arrest was based on a sale of heroin al-

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*hereinafter abbreviated as TTP

leged to have occurred March 9, 1967 (Transcript of Motion to Suppress** page 7).

The arrest warrant had been secured by Federal agent, Henry Watson, at approximately 4:30 o'clock p.m. on March 30, 1967. (TMS 23). No request or attempt was made by the arresting officers at that time or any other time to procure a warrant to search the premises at 1402 East Granada or any other premises. The stated reason for not obtaining a search warrant was that in the opinion of the arresting officers there was no probable cause for the issuance of such a warrant to search the premises at 1402 East Granada (TMS 101).

Federal agent Watson and other arresting officers met in the Federal Building in Phoenix at approximately 8:00 o'clock p.m. on March 30, 1967, ostensibly for the purpose of discussing and planning the execution of the arrest warrant on Petitioner CLARENCE WILLIAMS. (TTP 53; TMS 25-29; 90-91; 303). According to the testimony of one of the arresting officers at the hearing on the motion to suppress prior to trial, the specific search of the premises at 1402 East Granada was also discussed and planned at this meeting (TMS 281-282).

Upon the arresting officers arriving at the Granada premises after midnight on March 31, 1967, and identifying themselves, they were admitted into the living room of the house by Arlene Jackson (TTP 13; TMS 34-36), who was a defendant in the original trial but whose conviction was reversed by the Court of Appeals. Petitioner CLARENCE WILLIAMS was immediately placed under arrest (TMS 36-37). Simultaneously with the arrest of Petitioner CLARENCE WILLIAMS, eight or nine officers without the consent of Petitioner (TMS 49), without a search warrant (TTP 54; 74; TMS 49) and without inquiring as to the ownership of the premises (TMS 39-40), began a systematic

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**hereinafter abbreviated as TMS

general search of the premises (TMS 38) lasting approximately two hours (TMS 159).

In the course of this search, one of the officers discovered a metal container (Exhibit #1) on the upper closet shelf of the northeast bedroom (TTP 62; 76). In this container, a quantity of heroin (Exhibit #3) was found (TTP 114). Petitioner WILLIAMS and Mrs. Jackson were subsequently tried and convicted of possesssion of this heroin.

In the closet and dresser of this same bedroom, officers observed articles of male and female clothing (TTP 65). The ownership of this clothing was never established (TTP 84-85), though Petitioner CLARENCE WILLIAMS in getting dressed to go to the police station did take certain items of clothing from the closet and dresser (TT 22; 33).

The Court of Appeals upheld the conviction of Petitioner WILLIAMS, finding that the *Chimel* rule did not apply to searches conducted before the date of the U.S. Supreme Court decision, that the search was valid under pre-Chimel standards and was not simply done under the pretext of an arrest, and that as to Petitioner WILLIAMS, there was sufficient evidence of constructive possession of the heroin to find him guilty beyond a reasonable doubt. The Court disagreed with the jury's verdict in regard to defendant Jackson, however, on the ground of lack of sufficient evidence of constructive possession, and directed her acquittal. (Appendix A).

SUMMARY OF ARGUMENT

I

It is the contention of Petitioner that the rule in *Chimel vs. California* should be applied retroactively, at least to the extent of covering cases such as this involving direct review of a Federal conviction not yet final at the time the *Chimel* decision was handed down. As will be stated below, logic as well as sound principles of Constitutional law and history dictate such a result.

The arguments attempting to justify a totally prospective effect to the *Chimel* decision are not persuasive in light of the history and reasons for the *Chimel* decision, and the weight of evidence is that failing to give at least a limited retroactive effect to *Chimel* will create more problems than would be avoided by contrary result in regard to the functioning of the courts and law enforcement agencies.

II

Even if *Chimel* is not given even a partially retroactive effect, other principles of law governing Supreme Court review of Federal criminal cases indicate that the conviction herein should be reversed because the arrest of Petitioner herein was a pretext for the search that was made and therefore the search was not merely incident to a lawful arrest to the extent permitted by pre-Chimel standards.

ARGUMENT

I

The Chimel Rule Should Be Applied Retroactively In This Case.

In the first place, there is no doubt that if the rule in *Chimel vs. California,* 395 U.S. 752, is applied to this case, then the instant conviction must be reversed. Since this case is one of possession of heroin, the conviction obviously cannot be sustained if the heroin is not available to be introduced into evidence. Clearly, the heroin was not found within the immediate reach or person of the Petitioner as shown by the uncontradicted statement of facts, but rather was found in a closet in a home allegedly belonging to Petitioner. Such heroin was discovered only after an extensive search of said home following the arrest of Petitioner on the arrest warrant referred to in the statement of facts. Clearly and undisputably, if the *Chimel* case applies, the search was illegal and the heroin could not properly be admitted and the case would have to be reversed and probably the indictment dismissed for lack of evidence.

Thus, the Court is faced squarely with the proposition of whether *Chimel* should be applied retroactively to cover this situation. It should be noted that the instant case is a Federal criminal appeal, and therefore none of the considerations of comity between Federal and state governments apply, nor should the Court be reluctant to reverse the lower court since no semi-sovereign state court or state legislation is involved. Furthermore, this case is not one of collateral attack on habeas corpus or otherwise, but is a case on direct review wherein there had not even been a decision of the Court of Appeals in regard to the appeal of the conviction at the time the *Chimel* rule was handed down. This, of course, distinguishes the case from the case of *Elkanich vs. United States,* (No. 1142) also to be decided this term, upon which certiorari was earlier granted.

If it were not for the recent case of *Desist vs. United States,* 394 U.S. 244, it would seem clear that the Petitioner's plea for reversal should be granted under the authority of *Linkletter vs. Walker,* 381 U.S. 618. However, a four member plurality opinion in the *Desist* case, over strong dissents and objections by three members of the Court, appeared to hold that re-interpretation of Fourth Amendment Constitutional protections would be applied totally prospectively in the future. The *Desist* case is the first case to so hold, and it is submitted that it is out of tune with other cases decided by this Court supported by larger numbers of the justices and by better reasoning. Petitioner urges this Court to reconsider the *Desist* opinion and the entire line of cases on the subject of retroactivity so that a consistent and valid Constitutional scheme may be arrived at.

In the latter regard, Petitioner would commend to the Court the exhaustive and well-reasoned memorandum of law in regard to the retroactive application of criminal procedure decisions of the Appendix to the Brief of the Petitioner in the case of *Elkanich vs. United States* (No. 1142), for which certiorari was earlier granted. Petitioner hereby incorporates said memorandum by

reference into this brief and suggests that it sets forth many salient arguments in favor of a reconsideration of the retroactivity question.

However, as stated above, the Court does not have to go that far in order to reverse this case. The Court does not have to decide that it will intrude upon the state courts in order to make its Constitutional decisions retroactive, nor does the Court have to decide, in order to reverse this case, that collateral attack on already-final Federal or state convictions will be allowed. All the Petitioner asks for here is that he not be precluded from receiving the benefits of the *Chimel* rule on his direct appeal because of arbitrary notions as to when his appeal was docketed in relation to that involved in the *Chimel* case.

It should be noted that in *Linkletter vs. Walker,* 381 U.S. 618, in which the Court denied the availability of collateral attacks upon already-final cases decided prior to *Mapp vs. Ohio,* 367 U.S. 643, this Court noted in passing that it was in effect beyond argument that *Mapp* would apply to cases still pending on direct review at the time that *Mapp* was rendered. It was noted that the Supreme Court had in fact, without even discussing or pondering the question, granted relief itself in three cases that had not been finally decided at the time of the *Mapp* ruling. See *Ker vs. California,* 374 U.S. 23, *Fahy vs. Connecticut,* 375 U.S. 85, and *Stoner vs. California,* 376 U.S. 483. The Court stated on page 627 of 381 U.S. that it clearly appeared "that a change in law will be given effect while a case is on direct review." This court indicated in the *Linkletter* decision that the only questionable area of law on the subject of retroactivity was as to collateral attacks on final judgments, since certain public policy questions arose in such situations that did not arise in cases of direct review.

It is true that in the *Desist vs. United States* case, supra, this Court indicated that it was not bound by the *Linkletter* rule providing for limited retroactivity, and declined to grant any

retroactivity at all to the new rule against wire tapping enunciated in *Katz vs. United States,* 389 U.S. 347. Petitioner herein finds it virtually impossible to distinguish the *Desist* case from the instant case, and therefore must ask this Court to reconsider its plurality opinion in *Desist* because of the principles enunciated herein and the dissenting opinions noted in said *Desist* case.

Most of the recent cases decided on the question of retroactivity set forth a three-pronged test to determine whether retroactivity should be granted. This test includes the purpose of the new Constitutional standard, the extent of reliance by the courts and law enforcement authorities on the old standards, and the effect on the administration of justice if the new standard is applied retroactively.

Analyzing the first standard, it is submitted that the purpose of the rule in *Chimel vs. California* is to rein in law enforcement officials violating the "reasonableness" standard of the Fourth Amendment. This is not a new doctrine, but is simply a restatement of a very basic old doctrine that even assuming probable cause for a search, the extent and nature of the search must be reasonable. The purpose of this standard is to protect the homes and property of all citizens of the country, both those guilty of crimes and those not guilty of crimes. Since all searches from the time of the Constitution are supposed to be reasonable and limited in scope to what is necessary, it would appear that the sooner that said reasonableness is carried out in actual practice, the better off will be all citizens of the country, since the strength of this country depends upon the observance of the Constitutional standards of freedom upon which this country was founded. No purpose is seen to be gained by delaying the application of the tighter rules of the old standard of reasonableness until some future date after all searches prior to June of 1969 have come up through the Court system. Since the purpose is to protect the rights of all citizens and not merely to deter law enforcement officers, the sooner that the rights of

citizens are given such full protection, all concerned will be better off.

In regard to the second argument, it is clear that any reliance on rulings of this Court prior to *Chimel vs. California,* in regard to the search of premises incident to an arrest, was misplaced. It should be noted that the case of *Weeks vs. United States,* 232 U.S. 383, established the basic principle that evidence obtained through unlawful search may not be utilized in Federal prosecutions. *Mapp vs. Ohio,* 367 U.S. 643, extended that doctrine to state prosecutions. The Constitutional lawfulness of searches under *Weeks* and *Mapp* depend on two general factors—whether the search was unreasonably broad and whether it was conducted with sufficient probable cause.

It must be emphasized that *Chimel* did not materially change the basic application of the Fourth Amendment, unlike the *Katz* case, which held that the Fourth Amendment applied to nontrespassory invasions of privacy, and other Constitutional decisions interpreting the Fifth and Sixth Amendments which established new areas of Constitutional protection. *Chimel,* by contrast, was simply an interpretation of the scope of the established rule that physical searches incident to arrest must not be unreasonably broad, and also part of the basic principle that evidence seized from a person or his residence may not be used against him if it is not obtained reasonably and with probable cause.

It should be noted that although the *Chimel* case overruled prior decisions of this Court, primarily *U.S. vs. Rabinowitz,* 339 U.S. 56, this does not mean that *Chimel* created a new principle of Constitutional law. Rather, *Chimel* was just one of a long list of cases decided by this Court each year refining and defining the meaning and scope of the *Weeks-Mapp* rule. For example, no one has suggested that *Spinelli vs. United States,* 393 U.S. 410, should not be applied retroactively, although it certainly sharply tightens the rules for probable cause for the issuance of a

search warrant. The point universally recognized is that *Spinelli* is nevertheless within the ambit of previous decisions of the Supreme Court setting forth the nature and definition of "probable cause", and therefore does not set forth a new Constitutional rule that should only be applied in the future.

Another important consideration herein is the fact that the *Rabinowitz* rule is the one that is out of harmony with the trend of Constitutional law if one decision be in that category. It is submitted that *Chimel* returned the law to where it was prior to the decision of *Rabinowitz* that seems out of context with the trend of Constitutional law. Prior to *Rabinowitz* in 1950, the Courts had repeatedly disallowed general searches incident to even a valid arrest, and the tenure of *Rabinowitz* was accentuated by sharp dissents both in the *Rabinowitz* case itself and subsequent cases in this Court and lower courts which followed it. In any event *Rabinowitz* announced no flat permissive rule. It specifically held that the recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case. Certainly, prosecutors and police officials could not have relied upon such an uncertain and poorly-supported authority as a justification for general searches prior to the time of *Chimel.*

In regard to the last criterion, namely the effect on the administration of justice, it is submitted that the effect contended for by Petitioner herein would be small indeed. As noted above, Petitioner is asking only that retroactivity be extended to Federal criminal cases on direct appeal, a category which could not cover more than a few dozen cases. These are all cases wherein the defendants have not yet had their final day in court, and they certainly should be able to raise any issues permitted under existing Constitutional law to be raised. It is not a question of resuscitating evidence and witnesses long ago forgotten or lost, nor of attempting to free a person on the basis of Constitutional doctrines established 10 or 20 years after his

crime and conviction. Rather, a holding contrary to that sought by Petitioner would put a premium on timing by defense attorneys as to appeals. In short, if the attorney for Petitioner herein had been successful in securing this writ of certiorari during the last term of the Court, at the time that *Chimel* was decided, presumbably the instant case might have been the vehicle for the *Chimel* decision. Since his timing was not so accurate, his client is expected to serve the term in jail which would not otherwise be Constitutionally permitted under the *Chimel* rule. Such a system does not encourage respect for the administration of justice in any way whatsoever.

Although, as stated above, the *Desist* case is contrary to the doctrine contended herein, the Court's attention is called to the strong dissent by Justice Harlan therein, who pointed out that this Court had always held that it would make decisions retroactive when they were clearly foreshadowed by prior case law. Justice Harlan held that at a minimum, all new rules of Constitutional law must be applied to all cases still subject to direct review by the Court at the time of the new decision. He pointed out that it was unfair and unjudicial for a Court to pick and choose among defendants as to who would get the benefit of a new rule of Constitutional law. He indicated that was especially true when a case involved a Federal conviction, as in the instant case, rather than a rule imposed upon a defendant in a state court.

Even more cogent reasons for the retroactivity on direct appeal of *Chimel* were expressed by Justice Peters of the California Supreme Court in *People vs. Edwards*, 80 Cal. Rptr. 633, 458, P. 2d 713. Justice Peters, at Page 642 of 80 Cal. Rptr., says clearly that the *Chimel* rule should be retroactive to cases pending on direct appeal. He states:

> "In my view, the rule announced in Chimel applies to all pending cases. To hold that its rulings are purely prospective is an arrogant abuse of judicial power and a blatant exercise of legislative power. . . ."

Justice Peters points out that most of the arguments used in opposition to retroactivity are really attacks on the whole concept of the exclusionary rule, such as the argument that it is too late to deter police misconduct and that the guilty will go free. He states that the fundamental policies reflected by the *Mapp* ruling are frustrated by a prospective application rule. He states:

> "The immediate result of the refusal to apply Chimel to pending cases means that the Appellate and trial courts of this state will have a hand in the dirty business of securing convictions by the use of unlawfully obtained evidence. In these days, when so many people have taken to the streets in attacks upon our institutions and in defiance of the fundamental concepts of ordered liberty, it is more than ever necessary that a Court out of regard to its own dignity as an agency of justice and custodian of liberty strive to maintain that dignity, vindicate Constitutional rights, and encourage respect for a system of justice which does not sacrifice Constitutional rights for expediency. Yet we are told today that a trial court may convict Mr. Edwards and others on the basis of evidence seized in violation of Constitutional rights and, if so, Appellate Courts may affirm that conviction. Such a system lends no dignity to our court system and does not encourage respect for our institutions or our law."

Justice Peters pointed out that although the main purpose of the exclusionary rule is to deter improper police conduct, a rule applying the *Chimel* concept to cases presently on appeal will encourage rather than discourage that goal. He pointed out that it is essential that the police learn as soon as possible exactly what the limits of the *Chimel* rule are and all of its ramifications so that they may properly govern their conduct accordingly. He pointed out that if courts will not even consider the *Chimel* rule on pending cases, but must wait until new cases climb up through the appellate process, it will take years for case law to come down construing the ramifications of *Chimel* and applying standards for the police to use. In the interim, the police still will have to take their chances on the proper interpretations

and application of *Chimel* in cases not specifically covered by its exact holding, and the result may be to free additional criminals because of an illegal search when their post-Chimel searches finally come up for direct review a few years hence. Answering the argument that applying *Chimel* retroactively would hinder the administration of justice, Peters commented:

> "In any event, when the relatively few pending cases are weighed against the numerous searches which officers will conduct during the period when the Courts of this state refuse to consider the rules established by Chimel, it is apparent that the pending cases are merely the tip of the iceberg and furnish no justification to ignore its base. The business and sole justification for the Courts is declaring the law and determining controversies, and the possibility that the load of the Courts will be lightened does not warrant a refusal to declare or protect Constitutional rights. Such rights rest on no such uncertain grounds."

Justice Peters touches on another point referred to earlier by Justice Harlan, in regard to the fact that the *Chimel* rule had been foreshadowed by other cases. In other words, it is simply not true that police officers prior to *Chimel* had a full and complete right to rely upon the assumption that they could make any type of search that they wanted following an arrest without a search warrant. Justice Peters points out:

> ". . . Both the majority and the dissent in *Chimel* recognize that the United States Supreme Court had taken vacillating and somewhat inconsistent positions as to the permissible scope of a search incident to an arrest. As the majority there pointed out, a search of an entire home as incident to an arrest therein is not 'supported by a reasoned view of the background and purpose of the Fourth Amendmnet' and that it would be possible to distinguish such a search from prior cases by the Court . . . . As recognized by *Chimel* and by *United States vs. Rabinowitz*, 339 U.S. 56, 70 S. Ct. 430, the main case overruled by *Chimel*, the reasonableness of searches depends on the facts and circumstances, and the Courts have not been consistent in determining what princi-

ples are to be applied in determining reasonableness. *Chimel* establishes that reasonableness is to be determined by viewing the facts and circumstances in the light of established Fourth Amendment principles. Certainly this is not new law."

Justice Peters notes that Supreme Court Justice White pointed out in his dissenting opinion in *Chimel* that to go beyond the search of an arrested man and of the items within his immediate reach, there must be "probable cause to believe that seizable items are on the premises." As was pointed out in the statement of facts above, it is the contention of Petitioner herein that the weight of the factual evidence is that there was no probable cause to believe that there were drugs in the house of the Petitioner even apart from the fact that there was no warrant for the search of his house. Referring to the *Chimel* case itself, the majority opinion points out that numerous cases from the U.S. Supreme Court had shown that the right to search upon execution of an arrest warrant is not limitless. Among the cases cited for that view was *Trupiano vs. United States,* 334 U.S. 699, 68 S. Ct. 1229, *McDonald vs. United States,* 335 U.S. 451, 69 S. Ct. 191, *Agnello vs. United States,* 269 U.S. 20, 46 S. Ct. 4, *United States vs. Jeffers,* 342 U.S. 48, 72 S. Ct. 93, *Terry vs. Ohio,* 392 U.S. 1, 88 S. Ct. 1868, *Preston vs. United States,* 376 U.S. 364, 84 S. Ct. 881, and *Sibron vs. New York,* 392 U.S. 40, 88 S. Ct. 1889. At footnote 15 on Page 2042 of the Supreme Court Reporter citation, the U.S. Supreme Court gives a long list of cases which it states shows that *Harris vs. U.S.,* 331 U.S. 145, 67 S. Ct. 1098, and *U.S. vs. Rabinowitz,* the cases overruled by *Chimel,* have been relied upon less and less in the court's own decision. See also *U.S. vs. Kirschenblatt,* 16 F.2d 202 (Second Circuit).

In summary, therefore, it is submitted that even using the criteria developed by this Court in recent years to determine whether or not Constitutional decisions should be applied retroactively, that at least limited retroactivity to the extent contended for here should be granted to the *Chimel* decision based on a

proper interpretation of its purposes, its historical role and importance as a Constitutional decision, the extent of its reliance in the past, and the effect on the administration of justice.

II

The Arrest of the Petitioner Was a Mere Pretext to Carry Out A General and Exploratory Search Incidental to the Arrest.

The arresting officers in this case based the search of the premises where the arrest was made on the fact that it was made incidental to a lawful arrest (TMS 38). Even if the arrest warrant was valid, nevertheless the Petitioner contends that the search itself was a primary motive for the officers being at the Granada premises at that time, and therefore even if *Chimel* does not apply, the search was not reasonably incident to a lawful arrest and is therefore invalid. The arresting officers, knowing that they did not have probable cause to obtain a search warrant (TMS 101), used the arrest as a vehicle to circumvent the requirements of obtaining a search warrant. Thus the Petitioner submits that the search was not incidental to the arrest but that rather the arrest was incidental to the search.

On March 9, 1967, some three weeks before the arrest and search in question, Petitioner CLARENCE WILLIAMS is alleged to have sold heroin to a Federal narcotics agent (TMS 7). In the interim between March 9, and March 30, 1967, Petitioner was kept under surveillance as was the Granada residence (TMS 12-18; 81-83). There is no evidence that known narcotics dealers or users were observed going to or from the home during this period (TTP 41).

About four hours after the issuance of the arrest warrant for the Petitioner, a meeting of Federal, State and City officers was called at the Federal Building in Phoenix, in connection with the issuance of the arrest warrant. Approximately a dozen officers attended that meeting, (TTP 53; TMS 25-29; 243). Although

the ostensible reason for the meeting was to plan the execution of the arrest warrant that night, Petitioner alleges that in fact the primary purpose behind the meeting was the specific planning of the general exploratory search of the Granada premises. Robert Gutierrez, a City of Phoenix police officer, who was present at said meeting and also participated in the search at the place where Petitioner was arrested, testified that he was instructed at the meeting to assist Federal, State and City officials in carrying out a search of the Granada premises (TMS 281-282).

In *United States vs. James,* 378 Fed.2d 88 (6th Cir. 1967), approximately ten officers met at police headquarters before going to the appellant James' residence to serve an arrest warrant for a narcotics violation. The officers were assigned specific areas of the residence to search. After the arrest, a vacuum cleaner containing narcotics was found in a bedroom closet. The 6th Circuit Court in reversing appellant James' conviction for possession of narcotics and in agreeing with the appellant's contention that her arrest was a mere pretext to make the search, said:

> "Taking into account all of the admitted facts and circumstances of the case, including the large aggregation of agents and police officers, it seems to us that the agents and officers were interested in something more than merely making an arrest. It is clear that their primary purpose was to make a general exploratory search of the apartment with the hope of finding narcotics. This search in our judgment was unreasonable and violated the rights of Appellant James under the the Fourth Amendment to the Constitution. United States vs. Harris, 321 F.2d 739 (6th Cir. 1963)." (Pp. 90-91)

In *Amador-Gonzales vs. United States,* 391 F.2d 308 (5th Cir. 1968), the Appellate Court, in declaring a search incidental to a lawful arrest for a traffic violation to be illegal, said:

> "The rationale for the search incident to arrest exception is the historical right of an arresting officer to search the place of arrest and the practical consideration that once an arrestee's privacy is invaded by his being placed in lawful custody, there is little or no additional invasion in searching

him or the immediate surroundings which the police have entered to effect the arrest. Again, however, fidelity to the Fourth Amendment commands that the exception not engulf the rule. The lawfulness of an arrest does not always legitimate a search. General or exploratory searches are condemned even when they are incident to a lawful arrest. United States vs. Rabinowitz, 339 U.S. 62, . . . The arrest must not be a mere pretext for an otherwise illegitimate search. Henderson vs. United States, 4 Cir. 1926, 12 F.2d 258, . . .; Worthington vs. United States, 6 Cir. 1948, 166 F.2d 557; McKnight vs. United States, . . . , 183 F.2d 977; United States vs. Harris, 6 Cir. 1963, 321 F.2d 739; Taglavore vs. United States, 9 Cir. 1961, 291 F.2d 262." (Page 313)

In the *James* case, supra, the arresting officers had information that appellant James had used the searched residence as a place of business for the distribution of narcotics up to the date of the arrest.

As set forth above, in the instant case, there was no showing whatever of any connection between the Granada premises and the crime of the sale of heroin for which the arrest warrant was issued. Therefore, the appellant contends that the absence of any probable cause makes the use of an arrest warrant as a means to conduct a search incidental to an arrest even more of an unwarranted pretext than it was in the *James* case, supra.

It is further submitted that the companion cases to *Chimel, Von Cleef vs. New Jersey,* 395 U.S. 814, 89 S. Ct. 2051, and *Shipley vs. California,* 395 U.S. 818, 89 S. Ct. 2053, indicate that this search was not lawful even under pre-Chimel standards. These companion cases which did not apply *Chimel* applied the old rules of *U.S. vs. Rabinowitz,* 339 U.S. 56, 70 S. Ct. 430 and *Harris vs. United States,* 331 U.S. 145, 67 S. Ct. 1098.

In *Rabinowitz,* the place of search was a business room to which the public was invited. The room was small and under the immediate and complete control of the one arrested. In the instant case the place searched was a private residence. The article in question was seized from a bedroom shelf after the

defendants were arrested in another room of the residence. And of crucial importance, the record shows that the arresting officers had made no determination before the search of the ownership of the residence, nor of the ownership of clothing found in the same bedroom.

In *Harris,* the one arrested was in exclusive possession of a four-room apartment. Moreover, the police there, after making the arrest, were specifically looking for two cancelled checks which were thought to be the means and instrumentality used in the crime for which the petitioner there was arrested.

In the instant case, again, the arresting officers did not and could not establish that the defendants were in exclusive possession of the rooms searched. And unlike *Harris,* the police in the instant case already had in their hands the means used in the crime charged, namely, a quantity of narcotics from a previous sale.

The court in *Harris* stated: "Nor is this a case in which law enforcement officers have entered premises ostensibly for the purpose of conducting a general exploratory search for merely evidentiary materials tending to connect the accused with some crime." (331 U.S. at p. 153; 67 S. Ct. at p. 1102).

In the instant case, the Petitioner contends that the arresting officers did discuss the search of the residence in question *before* the search. The use of eight or nine officers in the arrest tends to confirm a real purpose of making a general exploratory search.

Mr. Justice Frankfurter, in his dissenting opinion in *Harris,* said: ". . . There was no search warrant, no crime was 'openly being committed in the presence of officers; the seized documents were not 'in plain view or picked up by the officers as an incident of the arrest. Here a 'thorough search was made without a warrant." (331 U.S. at p. 169; 67 S. Ct. at p. 1110).

None of the circumstances found lacking in *Harris* by Mr. Justice Frankfurter are present in the instant case.

In *Shipley,* supra, the police arrested the petitioner outside his house and then searched the house. The fact situation, therefore, can be distinguished from that of the instant case, where the appellants were arrested inside a private residence.

But the Supreme Court pointed out in *Chimel,* supra, that had the petitioner there been arrested earlier in the day at his place of business, no search could have been made in his house without a search warrant.

In *Chimel,* supra, the police searched the petitioner's three-bedroom house pursuant to an arrest warrant after the petitioner was arrested inside the house. Thus, the fact situation is very close, if not congruent, with that of the instant case.

The Court in *Chimel* held the search of the whole house unlawful. The Court said:

> "There is ample justification, therefore, for search of arrestee's person and area 'within his immediate control' construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence. There is no justification, however, for routinely searching rooms other than that in which an arrest occurs or, for that matter, for searching throughout all desk drawers or other closed or concealed areas in that room itself." (89 S. Ct. at p. 2040).

Even without retroactive application of *Chimel,* however, the Petitioner contends that the search in question violated the limiting standards of pre-Chimel law. Not only did the search in the instant case go beyond *Rabinowitz* and *Harris,* as argued above, but the Court in *Chimel* pointed out that *Rabinowitz* and *Harris* have been relied upon less and less in the Court's decisions.

Furthermore, in *Chimel,* the Court referred to its previous decision in *Sibron vs. New York,* 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968). In *Sibron,* a policeman had put his hand in the suspect's pocket for the purpose of finding narcotics. The Court held that search to be unlawful where it was made for a purpose other than protection of the police officer. The Petitioner

contends that the search in the instant case was manifestly for a purpose other than protection of the arresting officers.

Therefore, in summary on this point, it is contended that even if *Chimel* is not expressly made retroactive to apply to the instant case, that under the standards enunciated by this Court and other courts before *Chimel,* properly interpreted, the search herein was improper either because it was generally too broad in violation of the Fourth Amendment requirement as to reasonableness, or because the arrest was merely a pretext to justify a search which could not otherwise have been carried out because of the lack of probable cause in advance for such a search.

CONCLUSION

It is respectfully submitted that the decision below against the Petitioner should be reversed and the case remanded for further proceedings consistent with the holding that the decision in *Chimel* is applicable to Petitioner's case. This is necessary because of the premises above as to the need to apply *Chimel* retroactively at least on a limited basis and the fact that under no circumstances, regardless of the application of *Chimel,* can the search in question be justified under the plain reading of the Fourth Amendment requirement of reasonableness.

Respectfully submitted,

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APPENDIX "A"

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLARENCE WILLIAMS *and*
ARLENE JACKSON,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

Nos. 22871
22870

Appeal from the United States District Court
for the District of Arizona

Before: BROWNING, CARTER, and HUFSTEDLER, Circuit Judges

HUFSTEDLER, Circuit Judge:

Williams and Jackson were jointly tried and each was convicted for concealing illegally imported heroin in violation of 21 U.S.C. § 174.[1] Both of them appeal, raising the issues: (1) Did the District Court err in denying their motions to suppress the heroin as the product of an illegal search? (2) Did the District Court err in denying their motions for acquittal based upon the

[1] 21 U.S.C. § 174 provides in pertinent part: "Whoever . . . conceals . . . any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, . . . shall be imprisoned not less than five or more than twenty years . . . .

"Whenever on trial for a violation of this section the defendant is shown to have had or to have possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

insufficiency of the evidence to sustain the jury's implied finding of possession?

We hold: (1) The search was not illegal because Williams' arrest was not as a matter of law a pretext for the warrantless search and because the rule of *Chimel v. California* (1969) 395 U.S. 752 does not apply to searches conducted before June 23, 1969, the date of the *Chimel* decision; (2) the evidence was insufficient to support Jackson's conviction; and (3) the evidence was sufficient to support Williams' conviction.

Legality of the Search

Jackson and Williams contend that the heroin was the product of an illegal search because Williams' arrest was a pretext for a warrantless search of the Granada Street residence in which he was arrested and because the scope of the search went beyond that properly incident to the arrest.

The Government had probable cause to believe that Williams was a party to a sale of heroin on March 9, 1967. He was not then arrested, but he was kept under surveillance by federal and state law enforcement officers to try to find out the source of the narcotics. On March 30, 1967, federal narcotics agent Watson obtained a warrant for Williams' arrest for the sale on March 9. Federal, state, and city officers met at the Federal Building in Phoenix, Arizona, about 8:00 p.m. on March 30 for the purpose of planning the execution of the arrest warrant. There is a conflict in the evidence as to whether a search of the Granada Street residence was discussed at that meeting. Police Officer Gutierrez testified that the residence search was discussed and planned. Other law enforcement officers testified that there was no discussion about searching the Granada Street residence.

After the meeting, the officers circulated in various locations known to be frequented by Williams. During the period from 5:50 p.m. to 11:40 p.m. defendant Williams was constantly on the move. It was not until he returned to the Granada residence shortly before midnight that the officers located him. Shortly

after midnight eight officers entered the residence to arrest Williams. Williams was discovered in the living room. The search began almost immediately and lasted for about one hour and forty-five minutes. Federal agent Watson testified that they were looking for contraband, in particular, narcotics, and for Government money which had been used to purchase narcotics.

Defendant Williams contends that this evidence shows that "the arresting officers, knowing they did not have probable cause to obtain a search warrant [for the Granada residence], used the arrest as a vehicle to circumvent the requirements of obtaining a search warrant." The Government agrees than an arrest may not be used as a pretext to search for evidence without a search warrant where one would ordinarily be required under the Fourth Amendment.

Whether or not an arrest is a mere pretext to search is a question of the motivation or primary purpose of the arresting officer. Improper motivation has been found where the arrest is for a minor offense which serves as a mere "sham" or "front" for a search for evidence of another unrelated offense for which there is no probable cause to arrest or search. (*See Amador-Gonzales v. United States* (5th Cir. 1968) 391 F.2d 308; *Taglavore v. United States* (9th Cir. 1961) 291 F.2d 262.) It has also been found where the arresting officer deliberately delays making the arrest in order to allow the arrestee to enter the premises which the officer desires to search. (*Compare McKnight v. United States* (D.C. Cir. 1950) 183 F.2d 977 *with United States v. Weaver* (4th Cir. 1967) 384 F.2d 879, *cert. denied* (1968) 390 U.S. 983.)

There is ample evidence to sustain the District Court's finding that the arrest was not a pretext for the search. The search for contraband was related to the nature and purpose of the arrest. The delay in obtaining the arrest warrant was justified by the quest for more evidence and by the investigation to ascertain the source of the narcotics. The officers proceeded with due dili-

gence to execute the warrant after it was issued by serving Williams wherever he could be found. There is no evidence that the officers deliberately passed up an earlier opportunity to arrest Williams on the warrant. We cannot hold as a matter of law on this record that the primary purpose of executing the warrant upon Williams when he returned to the Granada residence was to search that house. (*Compare United States v. Costello* (2d Cir. 1967) 381 F.2d 698 *with United States v. James* (6th Cir. 1967) 378 F.2d 88.)

Williams was arrested in the living room of the Granada residence. Following his arrest ,the officers searched the whole house. The heroin was found in a container on a closet shelf in the northeast bedroom. *Chimel v. California, supra,* held that a search of the house in which a defendant is arrested is no longer within the bounds of a search incident to an arrest and that the constitutional perimeter of such a search is the person of the arrestee and the area "within his immediate control." (395 U.S. at 763.) The Williams search is illegal under the *Chimel* standard, and the heroin should have been excluded from the evidence if the *Chimel* rule applies retroactively to searches conducted before June 23, 1969.

The Supreme Court has expressly left open the question of *Chimel's* retroactivity. *Shipley v. California* (1969) 395 U.S. 818; *see also Von Cleef v. New Jersey* (1969) 395 U.S. 814.) However, in *Desist v. United States* (1969) 394 U.S. 244, the Court reiterated the guidelines for determining retroactivity of a new constitutional rule first stated in *Linkletter v. Walker* (1965) 381 U.S. 618:

> "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." (394 U.S. at 249.)

The Court in *Desist* said the foremost of the three criteria was

the first. If the purpose is to deter misconduct of police officers in conducting a search, the new exclusionary rule will not be given retrospective effect because that purpose is not advanced by penalizing conduct that has already occurred. The exclusionary rule in such cases, the Court observed, was a procedural device to curb illegal police action and not a rule affecting the integrity of the process for finding the innocence or guilt of an accused.

We are unable to see any meaningful difference between the purpose or the effect of the exclusionary rule announced in *Katz v. United States* (1967) 389 U.S. 347, affecting the admissibility of evidence obtained by electronic eavesdropping, and the exclusionary rule announced in *Chimel,* affecting the admissibility of evidence obtained by a search not reasonably incident to an arrest. We conclude, therefore, that the rule of retroactivity stated in *Desist* with respect to *Katz* applies in full measure to *Chimel.* Accordingly, we hold that the rule of *Chimel* applies only to those searches claimed incident to an arrest, conducted after June 23, 1969.[2]

The legality of the search incident to Williams' arrest is controlled by the pre-*Chimel* standards stated in *United States v. Rabinowitz* (1950) 339 U.S. 56 and *Harris v. United States* (1947) 331 U.S. 145: Was the search reasonable under the totality of the circumstances? We think it was. The arrest was for the sale of heroin, and the object of the search was the discovery of the contraband and of the Government money used to purchase heroin. As in *Harris,* the nature of the fruits of the crime makes it likely that "they would have been kept in some secluded spot." The search covered the house in which Williams was found and in which he gave every appearance of residing. The

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[2] The same result has been reached by the fifth Circuit in Lyon v. United States (1969) F.2d [No. 26190, Sept. 4, 1969], the Second Circuit in United States v. Bennet (1969) F.2d [No. 32327, Sept. 9, 1969], and by the California Supreme Court in People v. Edwards (1969) Cal. 2d [No. 12872, Sept. 23, 1969].

search was not of an area more extensive than that permitted in *Harris*.

Sufficiency of the Evidence

The Government's case against both Jackson and Williams rested exclusively upon the presumption from proof of possession stated in section 174. It was therefore incumbent upon the Government to prove beyond a reasonable doubt that each defendant possessed the heroin.

The Government had to prove that each defendant was in constructive possession of the heroin, because neither defendant had actual possession of the narcotic. One has constructive possession of contraband if he knows of its presence and has power to exercise dominion and control over it. (***Figueroa v. United States 9th Cir.*** 1965) 352 F.2d 587; ***Arellanes v. United States*** (9th Cir. 1962) 302 F.2d 603, ***cert denied*** (1962) 371 U.S. 930; ***Hernandez v. United States*** (9th Cir. 1962) 300 F.2d 114.)

Here is the evidence bearing upon the possession issue: When the federal narcotics agents rapped on the door of the Granada residence shortly after midnight on March 31, 1967, Jackson answered the door and admitted the officers. She was fully clothed. The agents walked into the living room and placed Williams under arrest. He was sitting on a sofa in the living room eating a meal from a tray and watching television. He was wearing underware, a robe, and slippers. After his arrest, Williams went to the northeast bedroom and dressed himself in clothing he took from the closet and the dresser in that room. Both the closet and dresser contained men's and women's apparel. The heroin was later discovered on the shelf of the closet from which Williams took some of his clothes.

Before the night of Williams' arrest, the Granada house had been placed under surveillance. Jackson has been seen either entering or leaving the house on four or five occasions. There was no evidence that the women's apparel in the northeast bed-

room was hers. There was no evidence that she owned or rented the house, or that Williams did so. Jackson's relationship, if any, to Williams was not proved.

To sustain the jury's finding of Jackson's guilt, we would have to decide that from the facts that she was in the house after midnight, that she had been seen entering and leaving the house on several prior occasions, and that there was feminine apparel in the northeast bedroom, the jury could reasonably have concluded that she was living in the house and sharing Williams' bedroom, that she had at least joint power to control the closet and its contents, and that she knew the heroin was there. Futher, we would have to be satisfied that the jury could have reached those conclusions free from any reasonable doubt, *i.e.*, that kind of doubt " 'that would make a person hesitate to act' in the more serious and important affairs of his own life." (*United States v. Nelson* (9th Cir. 1969) F.2d , quoting in part, from *Holland v. United States* (1954) 348 U.S. 121, 140.) The evidence against Jackson does not rise to that standard, and the case against her collapses.

The evidence of Williams' possession is very different from that of Jackson's. Williams was obviously at home in the Granada residence. He used clothes from the closet in which the heroin was found. He could have reached for the heroin as easily as he reached for his coat. The only ingredient of constructive possession which had to be proved circumstantially was his knowledge of the presence of the heroin. The jury could properly conclude that it was more probable than not that he had the requisite knowledge. From the presence of feminine apparel in the same closet, an inference can be drawn that a woman had access to the closet. But that inference does not contradict the inference that Williams knew that the heroin was in his closet and we cannot say that the inference is so strong as to raise a reasonable doubt that Williams did not know the contraband was there.

The judgment against Jackson is reversed. The judgment against Williams is affirmed.

APPENDIX "B"

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLARENCE WILLIAMS, Appellant, v. UNITED STATES OF AMERICA Appellee.	No. 22871 ORDER

Before: BROWNING, CARTER, and HUFSTEDLER, Circuit Judges

Appellant-petitioner is remitted to his remedy under 28 U.S.C. § 2255 to pursue his claim that the testimony of one of the Government's witnesses was perjured.

The petition for rehearing is denied.

/s/ SHIRLEY HUFSTEDLER
Shirley Hufstedler, Circuit Judge

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CITATIONS

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Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 81

CLARENCE WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 13–19) is reported at 418 F. 2d 159.

JURISDICTION

The judgment of the court of appeals (A. 20) was entered on October 17, 1969. A petition for rehearing *en banc* was denied on December 24, 1969 (A. 21). The petition for a writ of certiorari, was filed on January 26, 1970, after the time prescribed by Rule 22–2 of the Rules of this Court. On March 23, 1970, the petition for a writ of certiorari was granted (A. 22). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the search was reasonably incident to a lawful arrest under the standards which governed prior to the decision in *Chimel* v. *California*, 395 U.S. 752.

2. Whether the new rule announced in *Chimel* should be retroactively applied to cases pending on appeal at the time it was decided.

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of concealing illegally imported heroin in violation of 21 U.S.C. 174 (IR 1, 61; TTP 188, 200).[1] On February 26, 1968, he was sentenced to imprisonment for ten years (IR 68). On appeal his conviction was affirmed.[2]

The evidence, adduced at the hearing on the motion to suppress, which was denied (TMS 313), and at the trial, showed that the government had reasonable grounds to believe that petitioner had been a party to an illegal narcotics sale on March 9, 1967 (IR 6–15, 21; TMS 7–8, 51–53, 69). Federal, state and city police officers of Phoenix, Arizona, continued to

[1] For the sake of uniformity, we use the same abbreviations designated by petitioner, *i.e.*, "TTP" for the transcript of the trial proceedings, and "TMS" for the transcript of the motion to suppress. We are lodging with the Clerk copies of these two transcripts. "IR" refers to volume one of the record in the court below, a copy of which is on file with the Clerk of this Court.

[2] The court below found that the evidence of possession was insufficient as to co-defendant Arlene Jackson, who was tried jointly with petitioner, and reversed her conviction (A. 18–19).

investigate petitioner and co-defendant Jackson after March 9 to determine the source of supply of the narcotics (TMS 12, 13, 16, 17, 19, 20, 253). A check of the local utility company's records showed that petitioner and Mrs. Jackson lived at 1402 East Granada in Phoenix (TMS) 40). On occasions, law officers had observed petitioner park a 1959 Chevrolet and a 1967 Cadillac in front of this residence, and had seen petitioner and Mrs. Jackson enter and leave (TTP 14–15, 67–68, 82). One officer testified that he had observed the East Granada premises for several weeks prior to March 31, 1967, and had not seen anyone other than petitioner or Mrs. Jackson entering or leaving (TTP 41).

At 4:30 p.m. on March 30, after the officers had concluded that further investigation to locate the source of supply would not be fruitful, they obtained a warrant for petitioner's arrest for the illegal sale of heroin that had occurred on March 9 (TMS 21, 24). At 8:00 p.m. that evening, federal, state and local officers had a meeting, at which they were instructed to go to different locations to find petitioner and to arrest him pursuant to the warrant (TMS 28, 84, 135, 141, 201–202, 244–245, 303). No search warrant had been issued for the East Granada premises (TMS 49, 101, 214, 254). Four officers testified that at the meeting there was no discussion about plans to search the East Granada premises as incident to petitioner's arrest (TMS 29, 91, 203–204, 248–249). One officer testified that a search of these premises pursuant to a search warrant was discussed at the meeting (TMS 281–282).

Starting at about 9:00 p.m. (TMS 29–30, 92, 187), the officers went to various locations known to be frequented by petitioner, including his home on East Granada and his business address in downtown Phoenix (TMS 30, 32–33, 92–94, 245–247). While the officers were looking for petitioner, he was, according to his own testimony, constantly on the move from 5:50 p.m., when he left his East Granada residence, until his return there at 11:40 p.m. During that time he had gone to his business address, to various cocktail lounges and to a dog track (TMS 287–290, 293, 295–297). When petitioner drove up to his home in his Cadillac, it was the first time that day that the officers had seen him (TMS 23, 67, 136, 184, 221, 256). Agent Watson notified the other officers by police radio that petitioner had arrived home and the officers met at the East Granada address (TMS 59, 94).

At 12:10 a.m., agent Watson knocked on the front door and stated that he was a federal narcotics agent with a warrant for petitioner's arrest (TMS 34–35). After Mrs. Jackson opened the door, Watson entered and arrested petitioner in the living room (TMS 36). In the meantime other officers entered the home through various entrances (TMS 37, 59). Petitioner and Mrs. Jackson were the only persons on the premises other than the officers (TTP 13).

When agent Watson arrested petitioner, the latter was sitting on a sofa in the living room, eating a meal and watching television. He was dressed in his underwear and a robe, and wore slippers (TTP 12–13, 69). For approximately two hours following the arrest, the officers conducted a search for heroin and other evi-

dence of the crime (TMS 38, 105–106, 192, 196, 214–215, 252–253, 255; TTP 21). The search resulted in the seizure of cocaine, marihuana, $500 in government funds which had been used to purchase narcotics, and several loaded revolvers and rifles (TMS 45–46, 158). On a shelf in the closet in the northeast bedroom the officers seized a metal container which had in it five rubber containers of heroin. (TTP 62–63, 76, 114). This was the only closet in the bedroom; it also contained men's and women's clothing, one or two purses, men's hats and numerous shoes (TTP 65, 76). The room contained a double bed and a dresser in which there were men's and women's underclothing, some jewelry and socks (TTP 22–23, 65). Before leaving with the arresting officers, petitioner dressed in this bedroom, taking clothing from the dresser and closet (TTP 21, 22, 33, 69).

While the case was pending in the court of appeals, this Court decided *Chimel* v. *California,* 395 U.S. 752, *Shipley* v. *California,* 395 U.S. 818, and *Von Cleef* v. *New Jersey,* 395 U.S. 814. Thereafter, the court of appeals ordered the case resubmitted, specifically directing the parties to file supplementary briefs discussing the effect, if any, of those decisions on the present case. Subsequently, relying on previous decisions of this Court, the court of appeals held that *Chimel* should not be given retroactive effect. The court went on to uphold the validity of the search under pre-*Chimel* law.[3]

[3] Although in his petition for a writ of certiorari petitioner raised the sufficiency of the evidence as an issue presented, he apparently has abandoned it at this juncture.

SUMMARY OF ARGUMENT

I. Petitioner contends that the arresting officers delayed arresting him until his arrival at home so that they could conduct a warrantless search of his residence. After hearing extensive testimony concerning the officers' attempts to locate petitioner at numerous places in order to arrest him, the district court found that the arrest of petitioner at his home was not the product of a calculated plan, but was merely due to the fact that petitioner was constantly on the move the night of his arrest. The court of appeals correctly found that there was "ample evidence" to sustain this finding.

II. The rule announced in *Chimel* v. *California,* 395 U.S. 752, should not be held applicable to prior trials where reliable evidence had been obtained in conformity with the law as it then existed. The question of the retroactivity of *Chimel* is now before the court in *United States* v. *Elkanich,* No. 82 this Term, set for argument immediately preceding this case. Our views on the question of retroactivity of *Chimel* generally are set forth in our brief in *Elkanich,* to which we respectfully refer the Court.

Unlike *Elkanich,* which involves a collateral attack on a conviction pursuant to a proceeding under 28 U.S.C. 2255, the instant case arises on direct review. Recent decisions of this Court have recognized that, where it has been determined that a new constitutional rule is to be applied only prospectively, there is no necessity to differentiate between past cases in which the convictions were final on the date of the new

decision and cases in which appellate review was still in progress. In *Stovall* v. *Denno,* 388 U.S. 293, 300–301, the Court reasoned that the same factors which demonstrate the inappropriateness of retroactivity in general "make that distinction [between cases on collateral and direct review] unsupportable." The Court also pointed out that to distinguish between collateral and direct review would only increase the number of "chance beneficiaries" of a particular decision without in any way aiding the enforcement of Fourth Amendment rights. Two terms ago, in *Desist* v. *United States,* 394 U.S. 244, the court reaffirmed this principle in holding that *Katz* v. *United States,* 389 U.S. 347, would not be retroactively applied. *Katz,* like *Chimel,* arose in the context of the Fourth Amendment, where we believe that it is particularly appropriate to apply new decisions prospectively. Petitioner acknowledges that the instant case is indistinguishable from *Desist.* We submit that the principles stated in *Desist* should be reaffirmed.

ARGUMENT

I. THE ARREST OF PETITIONER AT HIS RESIDENCE WAS NOT A PRETEXT TO CONDUCT A SEARCH

Petitioner endeavored in the district court to show that the arresting officers delayed apprehending him until his arrival at home so that they could conduct a warrantless search of his residence. He failed to convince the courts below that this was so, however. The officer in charge and, with one exception, all other officers testified that once the arrest warrant was issued, they made a determined effort to locate and arrest him at numerous places other than his home.

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Their lack of success in this regard was not the product of a calculated plan, but was simply due to the fact that petitioner—as he himself testified—was constantly on the move on the night of the arrest (see TMS 287–290, 293, 295–297). Although petitioner has consistently contended that plans to search the residence were discussed at the meeting of the officers held immediately before they embarked on their search for petitioner, four officers in attendance at this meeting testified that no such plans were discussed (see TMS 29, 91, 203–204, 248–249). The only officer who testified to the contrary was also of the erroneous view that the officers were proceeding under a search warrant (TMS 281–282). The district judge, who recognized the discrepancies in the testimony, expressly declared that he had resolved them adversely to petitioner (TTP 124). The court of appeals found "ample evidence" to sustain this finding (A. 15).[4]

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[4] Petitioner charges that "[t]he stated reason for not obtaining a search warrant was that in the opinion of the arresting officers there was no probable cause for the issuance of such a warrant to search the premises at 1402 East Granada" (Pet. Br. 3). As authority for this allegation petitioner refers to the statement of one *local* officer which, when read in context, would be understood to mean that in the officer's own opinion *he* (or possibly the Phoenix police) did not have sufficient basis to obtain a search warrant (TMS 101). The answers to the immediately proceeding questions indicated that these questions and answers were aimed only at the knowledge of the officer and the local police, not that of the federal agents (TMS 101-102). The officer's statement cannot reasonably be understood to stand for the proposition that the federal authorities—who were the controlling figures in the investigation—felt they lacked adequate basis to obtain a search warrant. We note, moreover, that this officer testified that there was no previous

Nor was there any impropriety in the three-week delay between the March 9 transaction and the procurement of the warrant. As this court recently stated, "There is no constitutional right to be arrested" (*Hoffa* v. *United States,* 385 U.S. 293, 310). The delay here involved a reasonable investigative procedure aimed at discovery of the source of petitioner's heroin. It was only when the officer in charge determined that further surveillance would be futile that he procured a warrant for petitioner's arrest for the earlier sale (see TMS 12, 21). Thereafter, the officers exercised due diligence to effect execution of the warrant. On this record, their conduct is not suspect merely because they were able to locate petitioner only at his home (see *United States* v. *Weaver,* 384 F. 2d 879 (C.A. 4), certiorari denied, 390 U.S. 983).[5]

II. THE RESTRICTIVE RULE FIRST ANNOUNCED IN CHIMEL V. CALIFORNIA, 395 U.S. 752, SHOULD NOT BE HELD APPLICABLE TO PRIOR TRIALS WHERE RELIABLE EVIDENCE HAD BEEN OBTAINED AND INTRODUCED INTO EVIDENCE IN CONFORMITY WITH THE LAW AS IT THEN EXISTED.

On February 2, 1970, this Court granted certiorari in *United States* v. *Elkanich,* No. 82, this Term (396 U.S. 1057). This case has been set down for argument immediately following *Elkanich*. One of the issues there,

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plan to search petitioner's residence (TMS 91), but rather, that he "would have been arrested wherever we located him" (TMS 135).

[5] *United States* v. *James,* 378 F. 2d 88 (C.A. 6), relied on by petitioner, is inapposite, since there the officers met shortly prior to the arrest to plan petitioner's arrest at her apartment, made no attempt to execute the warrant elsewhere, and "descended en masse upon the apartment" (378 F. 2d at 90).

as here, is the retroactivity of this Court's decision in *Chimel* v. *California,* 395 U.S. 752. We respectfully refer the Court to our brief in *Elkanich,*[6] where our views on the question of retroactivity generally are elaborated at some length.[7] However, *Elkanich* involves a collateral attack on a conviction pursuant to a proceeding under 28 U.S.C. 2255, while this case comes before the Court on *direct* review of a conviction—a distinction we regard as without significance insofar as the retroactivity issue is concerned. Nonetheless, in view of this difference, it may be useful to articulate in summary fashion the reasons which support a holding of non-retroactivity here as well as in *Elkanich.*

Recent decisions of this Court have recognized that, where it has been determined that a new constitutional rule is to be applied only prospectively, there is no necessity to differentiate between past cases in which the convictions were final on the date of the new decision and cases in which appellate review was still in progress. In *Johnson* v. *New Jersey,* 384 U.S. 719, this Court first considered whether there is any reason to distinguish between direct and collateral attack in making determinations as to retroactivity or prospectivity. There the Court observed that previously, despite *Linkletter* v. *Walker,* 381 U.S. 618, where it had denied retroactivity to *Mapp* v. *Ohio,* 367 U.S. 643, *Mapp* had nevertheless been applied to

[6] We are sending a copy of our *Elkanich* brief to counsel for petitioner.

[7] See also the government's brief in *Desist* v. *United States,* No. 12, 1968 Term.

cases pending on direct review. A similar approach had been taken in *Tehan* v. *Shott,* 382 U.S. 406, with respect to the prospectivity of *Griffin* v. *California,* 380 U.S. 609. However, the Court announced in *Johnson* that (384 U.S. at 732):

> Our holdings in *Linkletter* and *Tehan* were necessarily limited to convictions which had become final by the time *Mapp* and *Griffin* were rendered. Decisions prior to *Linkletter* and *Tehan* had already established without discussion that *Mapp* and *Griffin* applied to cases still on direct appeal at the time they were announced. * * *

It was emphasized that these prior applications had been made "without discussion" and before the Court had explicitly focused upon the issue (*ibid.*). See Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling,* 42 N.Y.U.L. Rev. 631, 644–646 (1967).[8] In *Johnson,* the Court concluded that there are "no jurisprudential or constitutional obstacles" to adopting a rule of total non-retroactivity (384 U.S. at 733). Accordingly, *Escobedo* v. *Illinois,* 378 U.S. 478, and *Miranda* v. *Arizona,* 384 U.S. 436, were held to be inapplicable to cases on collateral review and also to those which were on direct review at the time they were decided. *Escobedo* and *Miranda* were given "[p]rospective application only to trials begun after the [new] standards were announced" (384 U.S. at 732).

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[8] *Mapp* and *Griffin* both antedated the Court's decision in *Linkletter.*

When again confronted with the same issue i *Stovall* v. *Denno,* 388 U.S. 293, this Court reaffirme its view that for purposes of retroactivity "no di tinction is justified between convictions now final * * and convictions at various stages of trial and direc review" (388 U.S. at 300). There the court reasone that the same factors which demonstrate the inap propriateness of retroactivity in general "make tha distinction [between cases on collateral and direc review] unsupportable" (*id.* at 300–301). Similarly, i *DeStefano* v. *Woods,* 392 U.S. 631, the Court, relyin on *Stovall,* explicitly stated that it perceived "no basi for a distinction between convictions that have be come final and cases at various stages of trial and appeal" (*id.* at 635, n. 2).

Only two Terms ago, in *Desist* v. *United States,* 39 U.S. 244, which involved the retroactivity of *Katz* v *United States,* 389 U.S. 347, the Court rejected the argument that cases which come before it on direct review should be afforded different treatment insofar as partial or total non-retroactivity is concerned. There the Court declared that the same reasons which called for prospective application of *Katz* "also undercut any distinction between final convictions and those still pending on review" (394 U.S. at 253).

Like *Desist* and *Katz,* both *Chimel* and the instant case arise in the Fourth Amendment context. It is peculiarly appropriate, we submit, to apply a rule of complete prospectivity to Fourth Amendment cases. This Court recognized as long ago as in *Elkins* v. *United States,* 364 U.S. 206, that the exclusionary rule in search and seizure cases "is calculated to prevent, not

to repair. Its purpose is to deter * * * by removing the incentive to disregard" the commands of the Fourth Amendment (*id.* at 217). This theme was reiterated in *Desist,* where the court reasoned (394 U.S. at 253):

> Both the deterrent purpose of the exclusionary rule and the reliance of law enforcement officers focus upon the time of the search, not any subsequent point in the prosecution, as the relevant date.

As we have contended in *Elkanich* v. *United States,* No. 82, this Term, the same rationale that militated against the retroactivity of *Katz,* argues persuasively that the same result be accorded to *Chimel.* Petitioner recognizes that *Desist* is squarely in point and that the decision in that case would have to be overruled for him to prevail here (Pet. Br. 6). Petitioner offers no better or different reasons[9] for such a holding than are suggested—and, we submit, are effectively refuted by our brief—in *Elkanich.*

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[9] It is of course, true that the number of cases potentially affected by applying a new rule only to cases on direct review, as distinguished from applying it in a wholly retroactive fashion, is less. But that consideration did not prevent the Court from ruling as it did in *Desist;* nor should it do so here. As in *Desist*, attention should be focused, in Fourth Amendment cases involving retroactivity questions, primarily on the *purpose* of the new rule. As the Court stated in *Desist* (394 U.S. at 249): "Foremost among these factors is the purpose to be served by the new constitutional rule. This criterion strongly supports prospectivity for a decision amplifying the evidentiary exclusionary rule." Such an emphasis on the purpose factor leads to the same result—non-retroactivity—whether a case on direct or on collateral review is involved, as the Court in *Desist* concluded.

In sum, in determining whether new rules shall b applied retroactively or not, this Court has consist ently, and, we believe, reasonably, held that where decision changes the principles governing action b law enforcement officers, the law in effect at the tim the officer acted is ordinarily controlling. In *Desist* for example, the Court focused on the operative con duct and held that the *Katz* rule applies only t searches and seizures conducted after the date of th *Katz* opinion. The Court emphasized that the exclu sion of evidence seized prior to the date of the *Katz* de cision "would overturn convictions based on fair reli ance upon pre-*Katz* decisions, and would not serve t deter similar searches and seizures in the future" (394 U.S. at 253).

As petitioner acknowledges, the same considera tions which led the Court to hold *Katz* prospective only are persuasive in this case. We submit that the principles stated in *Desist* should be reaffirmed. In deed, once a determination has been made that a deci sion is prospective only, to distinguish between col lateral and direct review would only increase the number of "chance beneficiaries"[10] of a particular decision without in any way aiding the enforcement of Fourth Amendment rights. As this Court concluded in *Stovall,* even though a degree of inequity "argu ably results from according the benefit of a new rule

[10] In the past, some members of this Court have expressed concern that an approach of complete nonretroactivity gives rise to "chance beneficiaries" of new rules. See *Desist* v. *United States*, 395 U.S. 244 (dissenting opinions of Douglas J., and Harlan J.); *Linkletter* v. *Walker*, 381 U.S. 618 (dissenting opinion of Black, J.).

to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue * * *, the fact that the parties involved are chance beneficiaries [is] an insignificant cost for adherence to sound principles of decision-making" (388 U.S. at 301). Cf., however, *Allen* v. *State Board of Elections,* 393 U.S. 544, 572, and *Cipriano* v. *City of Houma,* 395 U.S. 701, 706, where the Court applied its holdings in a wholly prospective fashion so as not to affect even the parties to the particular litigation, insofar as past action was concerned; admittedly, those cases did not arise in the criminal context, but *Cipriano,* as distinguished from *Allen,* did involve a constitutional holding.

Nor, finally, do we find persuasive petitioner's argument that the Court should not lend a hand to the illegality by denying relief to those who come before it on direct appeal. With all due respect to Justice Peters' dissent in *People* v. *Edwards,* 80 Cal. Rptr. 633, 640, and the legitimate concern it represents, we can discern no reason why the Court lends a hand to illegality when it denies effect to a recent decision on direct review any more than when it proceeds similarly in a case on collateral attack. In either case, we submit, the only relevant criterion is whether, after balancing competing arguments and considering the pertinent factors delineated by this Court in *Linkletter, Stovall, Desist,* and like cases—purpose, reliance, and effect—a particular decision is to be applied retroactively or prospectively. If it is to be denied

retroactive effect, then an evenhanded treatment requires that relief be denied in all cases where the law enforcement action was justifiably regarded as legal when conducted. Accordingly, it is not relevant to inquire about the stage at which the proceedings happen to be. Indeed, petitioner admits that it is "virtually impossible to distinguish the *Desist* case from the instant case" (Pet. Br. 8). We submit that he has presented no sound reason to depart from the approach there taken.

CONCLUSION

For the reasons stated, it is respectfully submitted that the decision of the court of appeals should be affirmed.

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WILLIAMS *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81. Argued October 21, 1970—Decided April 5, 1971*

In No. 81, here on direct review, petitioner was convicted of selling narcotics after a trial in which heroin seized in a search incident to his arrest was introduced into evidence. The Court of Appeals affirmed, holding that the intervening decision in *Chimel* v. *California*, 395 U. S. 752, narrowing the scope of permissible searches incident to arrest, was not to be retroactively applied to searches antedating the date it was decided, and that the search was valid under pre-*Chimel* law. Evidence at the trial of petitioner in No. 82 included marked bills seized during a pre-*Chimel* search of his apartment following his arrest on narcotics charges. The arrest and search were upheld at trial, on direct appeal, and in the District Court and Court of Appeals in proceedings under 28 U. S. C. § 2255. *Held:* The judgments are affirmed. Pp. 2--.

No. 81, 418 F. 2d 159, and No. 82, affirmed.

MR. JUSTICE WHITE, joined by THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN, concluded that *Chimel*, *supra*, is not retroactive and should not be applied to searches conducted prior to the date of that decision. Pp. 3–13.

(a) Where the major purpose of a new constitutional standard is not to overcome an aspect of a criminal trial that substantially impairs the truth-finding function and thus raises serious questions about the accuracy of guilty verdicts in past trials, the new rule does not require retrospective application. P. 6.

(b) The Constitution does not require that pre-*Chimel* searches be measured by the new *Chimel* standards, *Desist* v. *United States*, 394 U. S. 244. Petitioners' rights under then-existing law were

*Together with No. 82, *Elkanich* v. *United States*, also on certiorari to the same court.

not violated either before or during trial, it is not claimed that the evidence was constitutionally insufficient to prove guilt, and the purpose of the exclusionary rule will be sufficiently implemented by applying *Chimel* to searches occurring after the date of decision in that case. P. 9.

(c) There is no constitutional difference between the applicability of *Chimel* to convictions here on direct appeal and those involving collateral proceedings, or between federal and state prisoners. Pp. 9–12.

MR. JUSTICE BRENNAN believes that the question is not whether every person convicted through evidence obtained contrary to *Chimel*, *supra*, is guilty, but rather whether *Chimel* compels the conclusion that the invasion of petitioners' privacy, conducted in justifiable but mistaken reliance upon the continuing validity of pre-*Chimel* standards, requires the exclusion of the fruits of that invasion from the factfinding process. He agrees with the plurality opinion that it does not, and that the *Chimel* rule should not be applied retroactively. Pp. 1–6.

MR. JUSTICE BLACK concurs in the result on the ground that *Chimel*, *supra*, was wrongly decided.

MR. JUSTICE HARLAN concluded that the judgment should be affirmed in No. 82, here on collateral review, as the search in that case should not be subjected to the requirements of *Chimel*, *supra*, since petitioner's conviction became final prior to *Chimel*, then-prevailing law validated the search, and the conviction was obtained by methods not fundamentally unfair. Pp. 25–26.

MR. JUSTICE MARSHALL concluded that the judgment in No. 82 should be affirmed, as the mode of analysis in the plurality opinion is appropriate in cases here on collateral review, and the *Chimel* rule should not be applied retroactively in such cases. Pp. 1–2.

WHITE, J., announced the Court's judgment and delivered an opinion, in which BURGER, C. J., and STEWART and BLACKMUN, JJ., joined. STEWART, J., filed a separate statement. BRENNAN, J., filed a concurring opinion. HARLAN, J., filed an opinion concurring in part and dissenting in part. See No. 36, *Mackey* v. *United States*. MARSHALL, J., filed an opinion concurring in part and dissenting in part. BLACK, J., filed a statement concurring in the result. DOUGLAS, J., took no part in the consideration or decision of these cases.

SUPREME COURT OF THE UNITED STATES

Nos. 81 AND 82.—OCTOBER TERM, 1970

Clarence Williams, Petitioner,
81 *v.*
United States.

Joseph Elkanich, Petitioner,
82 *v.*
United States.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April 5, 1971]

MR. JUSTICE WHITE announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN join.

The principal question in these cases is whether *Chimel* v. *California*, 395 U. S. 752 (1969), should be applied retroactively either to the direct review of petitioner Williams' conviction or in the collateral proceeding initiated by petitioner Elkanich.

I

In No. 81, federal agents on March 31, 1967, secured a warrant to arrest petitioner Williams on charges of selling narcotics in violation of 18 U. S. C. § 174. Williams was arrested at his home that night. A quantity of heroin was discovered and seized in the course of a search incident to the arrest. The trial court sustained the search and the heroin was introduced in evidence. Williams was convicted and sentenced to a 10-year prison term. The judgment of conviction was affirmed by the Court of Appeals for the Ninth Circuit. *Williams* v. *United States*, 418 F. 2d 159 (CA9 1969). That court held: (1) that our intervening decision in *Chimel* v.

California, supra, was not retroactive and did not govern searches carried out prior to June 23, 1969, the date of that decision; and (2) that the search was valid under pre-*Chimel* law evidenced by *United States* v. *Rabinowitz,* 339 U. S. 56 (1950), and *Harris* v. *United States,* 331 U. S. 145 (1947). The Court of Appeals also rejected a claim that the search was invalid because the arrest was a mere pretext for an unwarranted search. We granted certiorari. 397 U. S. 986 (1970).

In No. 82, petitioner Elkanich was convicted on three counts of selling narcotics in violation of 21 U. S. C. § 174. He was sentenced to three concurrent 10-year sentences. The evidence introduced included marked bills given by federal agents to an intermediary to use in purchasing narcotics. The bills were seized during a search of petitioner's apartment following his arrest there. The search was challenged at trial on the ground that the arrest was invalid. Both the arrest and the incident search were upheld at trial and on direct appeal, *Elkanich* v. *United States,* 327 F. 2d 417 (CA9 1964), as well as by the District Court and the Court of Appeals in subsequent proceedings brought by petitioner under 28 U. S. C. § 2255. We granted the petition for certiorari to consider the effect, if any, of our *Chimel* decision, which intervened when the appeal from denial of petitioner's § 2255 application was pending in the Court of Appeals. 396 U. S. 1057 (1970). We affirm the judgments in both cases.

II

Aside from an insubstantial claim by Williams that his arrest was invalid,[1] neither petitioner in this Court

[1] The Court of Appeals correctly rejected Williams' claim that his arrest was a pretext to make an otherwise invalid search. *Williams* v. *United States,* 418 F. 2d 159, 160–161 (CA9 1969). In his petition for certiorari, Williams also argued that there was insuffi-

suggests that his conviction was unconstitutionally obtained; no evidence and no procedures were employed at or before trial that violated any then-governing constitutional norms. Concededly, the evidence seized incident to the arrest of both petitioners was both properly seized and admitted under the Fourth Amendment as construed and applied in *Harris* in 1947 and *Rabinowitz* in 1950. Both *Harris* and *Rabinowitz*, however, were disapproved by *Chimel*. That case considerably narrowed the permissible scope of searches incident to arrest, and petitioners argue that the searches carried out in these cases, if judged by *Chimel* standards, were unreasonable under the Fourth Amendment and the evidence seized inadmissible at trial.[2] However, we reaffirm our

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cient proof of his knowledge of and control over the heroin found in the incidental search of his home, and thus that the Government had failed to prove constructive possession. This claim was neither briefed nor argued by the parties, and we decline to disturb the judgment of the Court of Appeals rejecting it. See 418 F. 2d, at 162–163.

[2] Petitioner Williams was arrested pursuant to a warrant in the living room of his residence shortly after midnight. Eight officers were involved, and the entire house was searched for a period of about one hour and 45 minutes. The heroin introduced at trial was found in a container on a closet shelf in one of the bedrooms. *Williams, supra*, n. 1, at 161. The Government does not argue that this search incident to arrest complies with *Chimel*.

Elkanich was arrested without a warrant in his apartment. He does not argue that the arresting agents did not have probable cause to arrest but asserts that the search violated the Fourth Amendment. Three agents came to petitioner's apartment, and, after the door was opened by his wife in response to a knock, entered and immediately arrested petitioner. After handcuffing Elkanich, the agent in charge called for assistance. Three more agents arrived within 15 minutes, and they searched the four-room apartment for over an hour. The supervising agent asked petitioner if he had any large sums of cash, guns, "or anything of that kind" in the apartment. Petitioner at first said no, but later indicated

recent decisions in like situations: *Chimel* is not retroactive and is not applicable to searches conducted prior to the decision in that case. *Desist* v. *United States*, 394 U. S. 244 (1969).

In *Linkletter* v. *Walker*, 381 U. S. 618 (1965), we declined to give complete retroactive effect to the exclusionary rule of *Mapp* v. *Ohio*, 367 U. S. 643 (1961). Relying on prior cases, we firmly rejected the idea that all new interpretations of the Constitution must be considered always to have been the law and that prior constructions to the contrary must always be ignored. Since that time, we have held to the course that there is no inflexible constitutional rule requiring in all circumstances either absolute retroactivity or complete prospectivity for decisions construing the broad language of the Bill of Rights.[3] Nor have we accepted as a dividing line

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there was some money in a broom closet. The agent found $500 above the molding at the top of the closet, returned to the living room, and searched petitioner and his wife, finding $200 on each of them. Another agent then found a second roll of bills above the molding in the broom closet, this one totaling about $1,000. Two other items later introduced in evidence were seized from a closet in the living room. Of the total of nearly $2,000 seized, $1,550 was comprised of marked bills used by an undercover agent to purchase narcotics from one Rios, whom petitioner was alleged to be supplying.

The Government here argues that exigent circumstances justify the search without a warrant. The argument is that the presence of petitioner's wife in the apartment left the agents only two choices: (1) to postpone searching until a warrant could be secured, a course which would entail either some sort of control over the wife's activity or a risk that evidence would disappear; or (2) to search the apartment immediately, as they did.

Because of our resolution of the retroactivity question, we find it unnecessary to pass on this contention.

[3] Many of the cases are discussed in the majority and dissenting opinions in *Desist* v. *United States*, 394 U. S. 244 (1969). These cases, and the general question of prospective effect for judicial

the suggested distinction between cases on direct review and those arising on collateral attack.[4] Rather we have proceeded to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation

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decisions, have generated a substantial amount of commentary. See generally Bender, The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio, 110 U. Pa. L. Rev. 650 (1962); Currier, Time and Change in Judge-Made Law: Prospective Overruling, 51 Va. L. Rev. 201 (1965); Levy, Realist Jurisprudence and Prospective Overruling, 109 U. Pa. L. Rev. 1 (1960); Meador, Habeas Corpus and the "Retroactivity" Illusion, 50 Va. L. Rev. 1115 (1964); Mishkin, The Supreme Court 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56 (1965); Schaefer, The Control of "Sunbursts": Techniques of Prospective Overruling, 42 N. Y. U. L. Rev. 631 (1967); Schwartz, Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin, 33 U. Chi. L. Rev. 719 (1966); Spruill, The Effect of an Overruling Decision, 18 N. C. L. Rev. 199 (1940); Note, Retroactivity of Criminal Procedure Decisions, 55 Iowa L. Rev. 1309 (1970); Comment, Linkletter, Shott, and the Retroactivity Problem in Escobedo, 64 Mich. L. Rev. 832 (1966); Comment, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L. J. 907 (1962). Cf. Kitch, The Supreme Court's Code of Criminal Procedure: 1968–1969 Edition, 1969 Sup. Ct. Rev. 155, 183–200.

[4] See *post*, — (HARLAN, J., concurring and dissenting). Compare Mishkin, The Supreme Court 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56 (1965), with Schwartz, Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin, 33 U. Chi. L. Rev. 719 (1966).

In rejecting the distinction between cases pending on direct review and those on collateral attack, the Court in *Johnson* v. *New Jersey*, 384 U. S. 719, 732 (1966), stated:

"Our holdings in *Linkletter* and *Tehan* were necessarily limited to convictions which had become final by the time *Mapp* and *Griffin* were rendered. Decisions prior to *Linkletter* and *Tehan* had already established without discussion that *Mapp* and *Griffin* applied to cases still on direct appeal at the time they were announced."

will further or retard its operation." *Linkletter, supra,* at 629.[5]

Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial which substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect.[6] Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.

It is quite different where the purpose of the new constitutional standard proscribing the use of certain evidence or a particular mode of trial is not to minimize or avoid arbitrary or unreliable results but to serve other ends. In these situations the new doctrine raises no

[5] In our more recent opinions dealing with the retroactive sweep of our decisions in the field of criminal procedure, the approach mandated by *Linkletter* has come to be summarized in terms of a threefold analysis directed at discovering:

"(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

Stovall v. *Denno,* 388 U. S. 293, 297 (1967); see also *Desist* v. *United States,* 394 U. S. 244, 249 (1969).

[6] See, *e. g., Arsenault* v. *Massachusetts,* 393 U. S. 5 (1968) (giving retroactive effect to the right to counsel provided in *White* v. *Maryland,* 373 U. S. 59 (1963)); *McConnell* v. *Rhay,* 393 U. S. 2 (1968) (giving retroactive effect to the right to counsel provided in *Mempa* v. *Rhay,* 389 U. S. 128 (1967)); *Berger* v. *California,* 393 U. S. 314 (1969) (giving retroactive effect to *Barber* v. *Page,* 390 U. S. 719 (1968)); *Roberts* v. *Russell,* 392 U. S. 293 (1968) (giving retroactive effect to *Bruton* v. *United States,* 391 U. S. 123 (1968)); *Jackson* v. *Denno,* 378 U. S. 368 (1964); *Gideon* v. *Wainwright,* 372 U. S. 335 (1963); *Douglas* v. *California,* 372 U. S. 353 (1963); *Griffin* v. *Illinois,* 351 U. S. 12 (1956).

question about the guilt of defendants convicted in prior trials. *Mapp* v. *Ohio* cast no doubt on the relevance or probity of illegally seized evidence but excluded it from criminal trials to deter official invasions of individual privacy protected by the Fourth Amendment. *Katz* v. *United States*, 389 U. S. 347 (1967), overruled *Olmstead* v. *United States*, 277 U. S. 438 (1928), and *Goldman* v. *United States*, 316 U. S. 129 (1942), and gave expanded Fourth Amendment protection against nonconsensual eavesdropping. It followed that evidence obtained by nontrespassory electronic surveillance of a public telephone booth became subject to the exclusionary rule, which had been fashioned by the Court to exact compliance with the Amendment rather than to protect defendants from conviction on untrustworthy evidence. Thus the Court, when it came to consider the retroactivity of *Mapp* and *Katz*, was dealing with cases quite different from those situations where emerging constitutional doctrine casts such doubt upon the soundness of some aspect of prior trials that state and federal governments were disentitled from further pursuing the goals of their criminal law against defendants convicted in such prior trials.

The petitioners in both *Linkletter* and *Desist* were convicted in proceedings that conformed to all then-applicable constitutional norms. In both cases the government involved had a concededly guilty defendant in custody and substantial unsatisfied interests in achieving with respect to such defendant whatever deterrent and rehabilitative goals underlay its criminal justice system. Each defendant, Linkletter by the habeas corpus route and Desist on direct appeal, claimed the benefit of a later-decided case and demanded a new trial. But ordering new trials would involve not only expense and effort but the inevitable risk of unavailable witnesses

and faulty memories; the authorities might not have the evidence they once had and might be foreclosed from obtaining other evidence they might have secured had they known the evidence they were using was constitutionally suspect. Moreover, it was not essential to the deterrent purpose of the exclusionary rule that *Mapp* and *Katz* be given retroactive effect; indeed that purpose would have been only marginally furthered by extending relief to Linkletter, Desist, and all others in comparable situations. In these circumstances, we found no constitutional warrant for setting aside either conviction.[7]

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[7] The Fourth Amendment cases do not stand alone. We have reached similar results in holding nonretroactive new interpretations of the Fifth Amendment's privilege against compelled self-incrimination, although some ramifications of the privilege have more connection with trustworthy results than does the exclusionary rule designed to enforce the Fourth Amendment. See *Tehan* v. *Shott*, 382 U. S. 406, 414–415, n. 12 (1966); *Johnson* v. *New Jersey*, 384 U. S. 719, 730 (1966); *Desist* v. *United States*, 394 U. S., at 249–250, n. 14; cf. *Mackey* v. *United States*, *post*, at —. So too the right to jury trial secured by the Sixth Amendment "generally tends to prevent arbitrariness and repression," *DeStefano* v. *Woods*, 392 U. S. 631, 633 (1968), and the holdings in *Wade* v. *United States*, 388 U. S. 218 (1967), and *Gilbert* v. *California*, 388 U. S. 263 (1967), carry implications for the reliability of identification testimony. But both *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), obligating the States to recognize the right to jury trial by virtue of the Fourteenth and Sixth Amendments, and *Wade* and *Gilbert* were applied only prospectively in view of the countervailing considerations which retroactivity would entail. *DeStefano* v. *Woods*, *supra*; *Stovall* v. *Denno*, 388 U. S. 293 (1967).

In both *Johnson* and *Stovall*, we frankly acknowledged that "[t]he extent to which a condemned practice infects the integrity of the truth-determining process at trial is a 'question of probabilities.'" 388 U. S., at 298. Where we have been unable to conclude that the use of such a "condemned practice" in past criminal trials presents substantial likelihood that the results of a number of those trials were factually incorrect, we have not accorded retroactive effect to the decision condemning that practice. See *e. g.*, *DeStefano*,

III

Considering that *Desist* represents the sound approach to retroactivity claims in Fourth Amendment cases, we are confident that we are not constitutionally bound to apply the standards of *Chimel* to the cases brought here by Elkanich and Williams. Both petitioners were duly convicted when judged by the then-existing law; the authorities violated neither petitioner's rights either before or at trial. No claim is made that the evidence against them was constitutionally insufficient to prove their guilt. And the *Chimel* rule will receive sufficient implementation by applying it to those cases involving the admissibility of evidence seized in searches occurring after *Chimel* was announced on June 23, 1969, and carried out by authorities who through mistake or ignorance have violated the precepts of that decision.

IV

Both from the course of decision since *Linkletter* and from what has been said in this opinion, it should be

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supra, 392 U. S., at 633–634 (quoting *Duncan*): "'We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.'"

Our Brother HARLAN criticizes these decisions, stating that he finds "inherently intractable the purported distinction between those new rules that are designed to improve the factfinding process and those designed principally to further other values." *Post*, at 21. Earlier, he suggests that "those new rules cognizable on habeas ought to be defined, not by the 'truth-determining' test, but by the *Palko* [v. *Connecticut*, 302 U. S. 319, 325 (1937)] test." *Post*, at 20. But operating within the confines of a rule that seeks to determine, *inter alia*, whether a newly proscribed practice has probably produced factually improper results in cases where it was employed is surely to proceed with more definite bearings than are provided by a "test" that seeks to define those procedures which are "implicit in the concept of ordered liberty." See n. 8, *infra*.

clear that we find no constitutional difference between the applicability of *Chimel* to those prior convictions which are here on direct appeal and those involving collateral proceedings. Nor in constitutional terms is there any difference between state and federal prisoners insofar as retroactive application to their cases is concerned.

We accept MR. JUSTICE HARLAN's truism, stated in dissent, that our task is to adjudicate cases and the issues they present, including constitutional questions where necessary to dispose of the controversy. Hence, we must resolve the Fourth Amendment issues raised by Elkanich and Williams. But this leaves the question of how those issues should be resolved. Assuming that neither has a colorable claim under the pre-*Chimel* law but both would be entitled to relief if *Chimel* is the governing standard, which constitutional standard is to rule these cases? This is the unavoidable threshold issue—as MR. JUSTICE HARLAN describes it in discussing cases before us on collateral review, a "choice of law problem." *Post*, p. 8.

The opinions filed in these cases offer various answers to the question. We would judge the claims in both *Williams* and *Elkanich* by the law prevailing when petitioners were searched. Surely this resolution is no more legislative, and no less judicial, than that of MR. JUSTICE HARLAN. He feels compelled to apply new overruling decisions to cases here on direct review but deems himself free, with some vague and inscrutable exceptions,[8] to refuse the benefits of new decisions to those defendants who collaterally attack their convictions. The latter judgment seems to rest chiefly on his own assessment of the public interest in achieving finality in criminal

[8] Compare MR. JUSTICE HARLAN's treatment of petitioner Elkanich's case, *post*, at 25–26, with his resolution of *Mackey*, *post*, at 26–27. Cf. his discussion of *Gideon* and its application to cases on collateral review. *Post*, at 19–20.

litigation. The former is not explained at all except by repeated assertions that cases here on direct review are different.[9] But we have no authority to upset criminal convictions at will. Does the Constitution compel us to apply *Chimel* retroactively and set aside Williams' conviction when he was convicted on sound evidence secured in conformity with the then-applicable constitutional law as announced by this Court? As

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[9] Let us assume that X and Y are accomplices in a murder and that they are tried separately in the state courts. For any one of several reasons, including reversal and retrial or consensual delay, X's case proceeds slowly through direct review while Y's conviction is quickly affirmed. Assume further that after X's conviction is affirmed by the State's highest court, this Court holds that a practice employed in both the X and Y trials violates the Constitution. Both X and Y come before this Court at the same time seeking to have the new rule applied to their cases—X on direct review and Y by way of collateral attack. (Or, X and Y could be petitioners tried for wholly different offenses in different States or in different districts in the federal system. X, tried in a crowded jurisdiction and having appellate review in a busy judicial system, would be before this Court on direct review, while Y, whose case arose before less congested courts, would most likely be here on collateral attack.)

Under MR. JUSTICE HARLAN's approach, X automatically receives the benefit of the new rule—because we are a court of law somehow bound to decide all cases here on direct review in accordance with the law as it exists when the case arrives for consideration. Although we remain a court of law, Y may or may not receive the benefit of the new rule, the result depending on whether the new rule is designed to correct a practice which has come, over time, to shock our brother's conscience. Under our approach today, the result as to X and Y would be consistent, as they should be.

As a perceptive jurist has remarked:

". . . [W]hen a court is itself changing the law by an overruling decision, its determination of prospectivity or retroactivity should not depend upon the stage in the judicial process that a particular case has reached when the change is made. Too many irrelevant considerations, including the common cold, bear upon the rate of progress of a case through the judicial system." Schaefer, *supra*, n. 3, at 645.

we have said, we think not—no more so than it compels applying the teachings of *Chimel* in reviewing the denial of Elkanich's petition for collateral relief. Other than considering it inherent in the process of judicial review, MR. JUSTICE HARLAN does not directly address the question. Nor does he purport to explain how the purpose of the exclusionary rule fashioned by this Court as a Fourth Amendment mechanism will be at all furthered by mechanically affording Williams the benefit of *Chimel*.

We are also unmoved by the argument that since the petitioners in cases like *Mapp*, *Duncan*, and *Katz* have been given relief, when it was only by chance that their cases first brought those issues here for decision, it is unfair to deny relief to others whose cases are as thoroughly deserving. It would follow from this argument that all previous convictions that would be vulnerable if they occurred today would be set aside. Surely this is the tail wagging the dog. The argument was fairly met and adequately disposed of in *Stovall*. 388 U. S., at 301. We see no reason to repeat or reconsider what we said in that case.

It is urged that the prevailing approach to retroactivity involves confusing problems of identifying those "new" constitutional interpretations that so change the law that prospectivity is arguably the proper course. But we have no such problems in these cases since to reach the result it did the Court in *Chimel* found it necessary to disapprove *Harris* and *Rabinowitz* and under those cases the search in *Chimel* and the searches now before us would have been deemed reasonable for Fourth Amendment purposes. Moreover, the idea that circumstances may require prospectivity for judicial decisions construing the Constitution is an old one; it is not a new problem for the courts. It has not proved unman-

ageable and we doubt that courts and judges have suddenly lost the competence to deal with the problems which it may present.[10]

The judgments are

Affirmed.

While joining the opinion of the Court, MR. JUSTICE STEWART would also affirm the judgment in No. 82, *Elkanich* v. *United States*, on the alternative ground that the issue presented is not one cognizable in a proceeding brought under 28 U. S. C. § 2255. See *Harris* v. *Nelson*, 394 U. S. 286, 307 (dissenting opinion); *Kaufman* v. *United States*, 394 U. S. 217, 242 (dissenting opinion); *Chambers* v. *Maroney*, 399 U. S. 42, 54 (concurring opinion).

MR. JUSTICE BLACK, while adhering to his opinion in *Linkletter* v. *Walker*, 381 U. S. 618 (1965), concurs in the result on the ground that he believes that *Chimel* v. *California*, 395 U. S. 752 (1969), was wrongly decided.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of these cases.

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[10] Nor is the problem "greatly ameliorated," *post*, at 21, by the approach suggested by MR. JUSTICE HARLAN. For whenever our Brother HARLAN considers a case on collateral review, he must of necessity determine which of the prisoner's claims are grounded on "new" rules in deciding what "the law in effect when a conviction became final," *post*, at 18, was.

SUPREME COURT OF THE UNITED STATES

Nos. 81 AND 82.—OCTOBER TERM, 1970

81	Clarence Williams, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
82	Joseph Elkanich, Petitioner, v. United States.	

[April 5, 1971]

MR. JUSTICE BRENNAN, concurring.

Chimel v. *California*, 395 U. S. 752 (1969), applied principles established by a long line of cases[1] to determine the permissible scope of a warrantless search sought to be justified as the necessary incident of a lawful arrest. But in applying these principles to the circumstances involved in *Chimel*, we were compelled to overrule *Harris* v. *United States*, 331 U. S. 145 (1947), and *United States* v. *Rabinowitz*, 339 U. S. 56 (1950). *Harris* and *Rabinowitz* were founded on "little more than a subjective

[1] Our cases have settled the proposition that the Fourth Amendment requires agents of the Government to obtain prior judicial approval of all searches and seizures, see, *e. g.*, *Davis* v. *Mississippi*, 394 U. S. 721, 728 (1969); *Katz* v. *United States*, 389 U. S. 347, 356–357 (1967); *James* v. *Louisiana*, 382 U. S. 36 (1965); *Preston* v. *United States*, 376 U. S. 364, 368 (1964); *McDonald* v. *United States*, 335 U. S. 451, 455–456 (1948); *Agnello* v. *United States*, 269 U. S. 20, 33 (1925), subject only to a few narrow and well-delineated exceptions grounded upon urgent necessity. *Terry* v. *Ohio*, 392 U. S. 1, 16–27 (1968); see *Katz* v. *United States*, *supra*, at 357 n. 19 and cases cited; cf. *Chambers* v. *Maroney*, 399 U. S. 42 (1970). And in all events, "[t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry* v. *Ohio*, *supra*, at 19, quoting *Warden* v. *Hayden*, 387 U. S. 294, 310 (1967) (concurring opinion).

view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests." *Chimel, supra,* at 764–765; see *United States* v. *Rabinowitz, supra,* at 83 (Frankfurter, J., dissenting). By the time of *Chimel,* this view had long since been rejected; but until that day, *Harris* and *Rabinowitz* survived as direct authority for the proposition that a lawful arrest would somehow justify a warrantless search of the premises on which the arrest was made, beyond the immediate reach of the person arrested.[2]

Accordingly, we are presented in these cases with the question whether *Chimel* should be applied to require the exclusion at trial of evidence which is the fruit of a search, carried out before our decision in *Chimel,* and which would be lawful if measured by the standards of *Harris* and *Rabinowitz,* but unlawful under the rule of *Chimel.* The Court today holds that the fruits of searches made prior to our decision in *Chimel* may be used in criminal trials if the searches may be justified under the standards of *Harris* and *Rabinowitz* as those standards had previously been applied. See, *e. g., Von Cleef* v. *New Jersey,* 395 U. S. 814 (1969). I agree. In *Stovall* v. *Denno,* 388 U. S. 293, 297 (1967), we said that

> "[t]he criteria guiding resolution of [this] question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

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[2] Long before *Chimel,* of course, we had made clear that *Harris* and *Rabinowitz* were not themselves without limit. *James* v. *Louisiana,* 382 U. S. 36 (1965); *Kremen* v. *United States,* 353 U. S. 346 (1957); see *Von Cleef* v. *New Jersey,* 395 U. S. 814 (1969); *Stanley* v. *Georgia,* 394 U. S. 557, 569–572 (1969) (separate opinion).

All three factors imply that the rule of *Chimel* should be applied only to searches carried out after *Chimel* was decided.

I

Like the Fifth Amendment's protection against compulsory self-incrimination, the warrant requirement of the Fourth Amendment stakes out boundaries beyond which the government may not tread in forcing evidence or information from its citizens. When coercion, impermissible under the Fifth Amendment, has actually produced an involuntary statement, we have invariably held that the fruits of that unconstitutional coercion may not be used to prosecute the individual involved for crime. *E. g., Rochin* v. *California,* 342 U. S. 165, 173 (1952) (Frankfurter, J.); *Ashcraft* v. *Tennessee,* 322 U. S. 143 (1944); *Boyd* v. *United States,* 116 U. S. 616, 630–635, 638 (1886).[3] Exclusion of statements impermissibly coerced is not merely a device to deter government agents from improper conduct in the future. Exclusion of coerced testimony is part and parcel of the privilege against self-incrimination. Likewise, when a search impermissible under the Fourth Amendment results in the seizure of evidence, exclusion of the fruits of that unconstitutional invasion is required not merely in hope of deterring unconstitutional searches in the future, but in order to vindicate the right of privacy guaranteed by the Fourth Amendment. See *Boyd* v. *United States, supra; Weeks* v. *United States,* 232 U. S. 383, 390–394, 398 (1914); *Mapp* v. *Ohio,* 367 U. S. 643, 656, 660 (1961). Exclusion of evidence in order to vindicate the right

[3] Under what circumstances the Fifth Amendment requires that the individual concerned be granted immunity from prosecution for the matters revealed in his statements is a question not pertinent here. See *Piccirillo* v. *New York,* — U. S. —, ——— (1971) BRENNAN, J., dissenting).

of privacy, however, does not improve the reliability of the factfinding process at trial. See *Desist* v. *United States*, 394 U. S. 244, 249–250 (1969), and cases cited. Accordingly, this factor does not require that the standards of *Chimel* be retroactively applied. *Desist* v. *United States*, *supra*; *Stovall* v. *Denno*, 388 U. S., at 297–299.

II

The factor of reliance by law-enforcement officials on *Harris* and *Rabinowitz* points in the same direction. As we recognized in *Chimel* itself, Fourth Amendment jurisprudence has often followed a tortuous path. 395 U. S., at 755–762. So long as *Harris* and *Rabinowitz* were not visibly overruled, we cannot be surprised that policemen and those who offer them guidance may not have scrutinized their doctrinal underpinnings for signs of erosion. And the extent of reliance, it appears, has been considerable. The Government represents, and petitioners do not seriously dispute, that a very substantial number of searches have been carried out in reliance upon these cases. In many of these, there is no reason to doubt that a warrant could and would have been obtained if the officials involved had been aware that a warrant would be required. This factor as well, therefore, implies that *Chimel* should have only prospective application.

III

Finally, we must evaluate the probable impact of retroactive application on the administration of justice. Persons convicted through the use of evidence inadmissible under *Chimel* have been found to have engaged in conduct which the government involved may legitimately punish. *Chimel* casts no doubt upon the propriety of the government's interest in punishing those who have engaged in such conduct. Accordingly, it may fairly be assumed that retroactive application of its standards

would result in a substantial number of retrials. Yet *Chimel* likewise casts no doubt upon the reliability of the initial determination of guilt at the previous trial. Moreover, the legitimate reliance of law-enforcement officials on *Harris* and *Rabinowitz*, as already noted, may well have led them to conduct a warrantless search merely because the warrant requirement, although easily satisfied, was understandably not understood. The consequence of this is that retroactive application of the standards applied in *Chimel* would impose a substantial burden upon the federal and state judicial systems, while serving neither to redress knowing violations of individual privacy nor to protect a class of persons the government has no legitimate interest in punishing.

IV

This is not to say, however, that petitioners are to be denied relief because they are probably guilty. "[T]here is always in litigation a margin of error representing error in fact-finding." *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958). The constitutional requirement that guilt in criminal cases be proven beyond a reasonable doubt serves to limit, but cannot eliminate, the number of criminal defendants found guilty who are in fact innocent. See *In re Winship*, 397 U. S. 358, 370–372 (1970) (concurring opinion). In the present cases, both petitioners asserted their innocence by pleading not guilty and going to trial; and petitioner in No. 81, whose case is here on direct review, raised in his petition for certiorari the question whether the evidence presented at trial was sufficient to support a finding of guilt. But this Court does not sit to review such questions. In denying retroactive application to the rule of *Chimel*, we neither do nor could determine that every person convicted by the use of evidence obtained contrary to that rule is in fact guilty of the crime of which he was convicted. The question

we face is not the legitimacy or sincerity of petitioners' claims of innocence, or indeed whether any such claim is expressly made at all. It is, instead, whether *Chimel* v. *California* compels us to conclude that the invasion of petitioners' privacy, conducted in justifiable but mistaken reliance upon the continuing validity of *Harris* and *Rabinowitz*, requires the exclusion of the fruits of that invasion from the factfinding process at trial. I agree with the Court that it does not, and that the standards of *Chimel* should apply only to searches carried out after June 23, 1969.

SUPREME COURT OF THE UNITED STATES

Nos. 81 AND 82.—OCTOBER TERM, 1970

Clarence Williams, Petitioner, 81 *v.* United States. Joseph Elkanich, Petitioner, 82 *v.* United States.	On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April 5, 1971]

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

After studying afresh the pattern of the Court's retroactivity decisions since *Linkletter* v. *Walker*, 381 U. S. 618 (1965), I conclude that a decision of this Court construing the Constitution should be applied retroactively to all cases involving criminal convictions not yet final at the time our decision is rendered. Sound jurisprudential reasoning, so well articulated by MR. JUSTICE HARLAN in his separate opinion covering the present cases, in my view requires that cases still on direct review should receive full benefit of our supervening constitutional decisions. I am persuaded that willingness to tolerate the inevitable costs and anomalies of the Court's current approach to retroactivity is incompatible with the judicial duty of principled review of convictions not yet final.

I disagree somewhat with MR. JUSTICE HARLAN as to the proper approach to retroactivity for cases arising on habeas corpus or other modes of collateral attack. In such cases I believe it is best to employ the three-part analysis that the Court undertakes today in deciding the retroactivity of the rule in *Chimel* v. *California*, 395 U. S.

752 (1969). This mode of analysis was foreshadowed in *Linkletter*, where the question was whether the rule of the *Mapp* case should be applied on collateral review. The method commends itself, once the point of finality after direct review is passed, as a careful and appropriate way of adjudicating the "procedural" rights of litigants in view of the purposes of a new decisional rule and the concerns of effective law enforcement. In particular, if the purposes of a new rule implicate decisively the basic truth-determining function of the criminal trial, then I believe the rule should be given full retroactive application, for the required constitutional procedure itself would then stand as a concrete embodiment of "the concept of ordered liberty." *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937).

In light of the above, I concur in the Court's disposition of No. 82. That case is before us on collateral review. For cases in such a posture the mode of analysis used by the plurality is appropriate, and I agree that the *Chimel* rule should not be applied retroactively to such cases.

No. 81 is before us on direct review. Since there is a clear violation of *Chimel* on the facts, I would reverse the judgment below, for I believe that the same constitutional rule should be applied to adjudicate the rights of the petitioner in No. 81 as was applied in Chimel's case.